Missouri Attorney General's Opinions - 1977

Opinion	Date	Topic	Summary
6-77	Mar 17	STATE EMPLOYEES. HIGHWAY PATROL. RETIREMENT. PENSIONS.	An employee of the state of Missouri who was employed by the Missouri State Highway Patrol from January 19, 1946 until February 24, 1946, and who then resigned to reenlist in the United States Army, and who subsequently served continuously in the United States Army until May of 1965, and who went to work for the state of Missouri in August of 1965, and has continuously been employed by the state since that time, is not entitled to receive prior state or military service credit with the Missouri State Employees' Retirement System from January, 1946 until August, 1965.
8-77	June 6	LICENSES. NURSING HOMES.	The Board of Nursing Home Administrators is required to assess and collect a fee of $50 prior to the examination of an applicant for license and the Board may not waive this fee when an applicant is reexamined on part of the examination.
10-77	Apr 7	COORDINATING BOARD FOR HIGHER EDUCATION. STATE ANATOMICAL BOARD. REORGANIZATION ACT.	Monies received by the State Anatomical Board are to be deposited in the state treasury. Expenditures are to be made by such board from appropriations by the General Assembly.
13-77	Dec 30		Opinion letter to Mr. Owens Lee Hull, Jr.
14-77	Apr 27	CREDIT UNIONS. CONSUMER AFFAIRS, REGULATION, AND LICENSING.	A credit union in possession is not required to pay for the operating expense and compensation of a regular employee of the Division of Credit Unions who, as a part of his official duties, is operating the credit union in possession on behalf of the Director of the Division of Credit Unions.
15-77	Feb 2		Opinion letter to Mr. Robert H. Daugherty
16-77	Feb 1		Opinion letter to Mr. Kenneth Karch
17-77	Aug 25		Opinion letter to The Honorable James C. Kirkpatrick
20-77	Jan 14	CRIMINAL LAW. LOTTERIES. GAMBLING.	(1) Section 563.374, RSMo 1969 would not prohibit the printing of advertisements or other promotional material in Missouri for use in consumer sweepstakes conducted outside this state when the printed material is shipped directly to the out-of-state locations. (2) Section 563.430, RSMo 1969 and Section 563.440, RSMo 1969 do

			not apply to or prohibit the printing of advertisements or promotional material in Missouri for use in consumer sweepstakes conducted outside the state when the printed material is shipped directly to the out-of-state locations.
22-77	Jan 21		Opinion letter to Mr. Wm. Kenneth Carnes
23-77	May 18	CONSTITUTIONAL LAW. COMMON PLEAS CLERKS.	The office of clerk of the Cape Girardeau Court of Common Pleas will be abolished as of January 2, 1979, when Article V, Section 27, Missouri Constitution, becomes effective.
25-77	Sept 27		Opinion letter to Mr. James F. Walsh
27-77	Feb 25	DRAINAGE DISTRICTS. TAXATION.	The board of supervisors of a drainage district organized in the circuit court under provisions of Chapter 242, RSMo, may levy a tax for organizational purposes at different times provided that the total taxes levied for this purpose do not exceed the sum of one dollar per acre for each acre of land within the district.
28-77	Apr 28	ROADS AND BRIDGES. DRAINAGE DISTRICTS.	The word "bridge," as used in Section 242.350, RSMo, includes "culvert"; and drainage districts organized under the provisions of Chapter 242, RSMo, may utilize culverts rather than bridges where the drainage ditches of the district cross public roads.
29-77	Apr 11	MAGISTRATES.	The civil jurisdiction of the magistrate courts, including the magistrate courts in the City of St. Louis, is provided for in Section 482.090 as amended by C.C.S.H.B. Nos. 1317 and 1098, 78th General Assembly, Second Regular Session, in the maximum amount of $5,000.
30-77	Jan 13		Opinion letter to The Honorable C. E. Hamilton, Jr.
31-77			Withdrawn
33-77	Feb 25	COOPERATIVE AGREEMENTS. DEPARTMENT OF PUBLIC SAFETY. LAW ENFORCEMENT ADMINISTRATION.	The Department of Public Safety, Missouri Council on Criminal Justice, although it does not have the authority to determine the number of and the geographical boundaries of regional criminal justice planning units which have been established by cooperative agreement by and between political subdivisions of the State of Missouri pursuant to the provisions of Section 70.220, RSMo 1969, can choose not to recognize the regional planning units as they presently exist, and is not required by state law to make federal money available to those presently existing regional criminal justice planning units for law enforcement planning purposes.
34-77	Mar 30		Opinion letter to Mr. Edwin M. Bode
35-77	Jan 20	COMPENSATION. PROSECUTING	Section 56.280, RSMo Supp. 1975, relating to the compensation of prosecuting attorneys in counties of the third and fourth classes, does

		ATTORNEY.	not repeal the provisions for additional compensation for such prosecuting attorneys under Sections 56.285 and 56.291, RSMo, and the prosecuting attorneys of such counties are entitled to compensation based on all such sections.
37-77	Jan 25		Opinion letter to Mr. James Walsh
38-77	Jan 7		Opinion letter to Dr. Arthur L. Mallory
39-77	Feb 25	LIQUOR. SUNDAY SALES.	Persons holding licenses for the sale of intoxicating liquor by the drink and those holding licenses for the sale of malt liquor only are eligible for "Sunday sale" licenses under Section 311.097, RSMo Supp. 1975.
41-77	Jan 7	REORGANIZATION ACT. DEPARTMENT OF REVENUE.	A Deputy Director of Revenue, appointed pursuant to Section 1.6(6) of the Omnibus State Reorganization Act, Appendix B, RSMo Cum. Supp. 1975, can hold such office and legally exercise all powers of the Director of Revenue for a period not to exceed six consecutive months in the event the Director of Revenue should resign.
42-77			Withdrawn
43-77			Withdrawn
50-77	Mar 2	PROSECUTING ATTORNEY. CONCEALED WEAPONS.	Prosecuting attorneys are not conservators of the peace and are, therefore, not exempt from the provisions of Section 564.610, RSMo 1969, relating to carrying of concealed weapons.
52-77	July 19		Opinion letter to The Honorable Abe Paul
53-77	Dec 30		Opinion letter to Mr. William C. McIlroy
54-77	June 21	LIBRARIES. CITY LIBRARIES.	The Jefferson City Library Board has no authority to establish a fund other than the funds specifically provided for by statute.
56-77	Aug 29	SNOWMOBILES. MOTOR VEHICLES. DRIVERS' LICENSES.	A snowmobile is not required to be registered and licensed as a motor vehicle, but it is unlawful to operate a snowmobile upon the highways of this state if it is not properly equipped and if the operator is not properly licensed.
60-77	Apr 8	COUNTY COURT. DEPUTY ASSESSORS. ASSESSORS.	A county assessor in a third class county may appoint such clerks and deputies as he deems necessary subject to the approval of the county court.
61-77	June 28	LIMITED DRIVING PRIVILEGES. MOTOR VEHICLES. DRIVERS' LICENSES. LICENSES.	A magistrate court which convicts a driver, who is driving under a court order of a different court granting hardship driving privileges, of an offense which results in the assessment of points under the provisions of Section 302.302, RSMo Supp. 1975, other than a violation of a municipal stop sign ordinance where no accident is involved, is required, under Section 302.309, RSMo, to notify the driver, the

			director of revenue and the court which granted the order, of the conviction. Such magistrate court does not have the authority to require that the defendant surrender the order granting hardship driving privileges, although such order is terminated as a matter of law.
62-77	Mar 9	AMBULANCE DISTRICTS.	An ambulance district may borrow money and become indebted in an amount not in excess of the anticipated revenue for the current year plus any unencumbered balances from previous years without a vote by the people.
64-77	Mar 17	TAXATION. ASSESSMENT. NEW MOTOR VEHICLES.	The assessed valuation of new motor vehicles held for sale in the ordinary course of business is to be determined pursuant to Section 150.040(2), and that this amount is not to be further reduced by virtue of Section 137.115, RSMo Supp. 1975.
65-77	Feb 23	POLICE. CITY POLICE. CITIES, TOWNS & VILLAGES. INITIATIVE & REFERENDUM.	A fourth class city board of aldermen which has, with the approval of the voters, provided for the appointment of a chief of police under the provisions of Section 79.050, RSMo, has the authority to repeal such ordinance without approval of the voters and to reestablish the office of city marshal.
67-77			Withdrawn
68-77	Feb 23	APPROPRIATIONS. GENERAL ASSEMBLY. UNIVERSITY OF MISSOURI. CONSTITUTIONAL LAW.	The legislature is not prohibited by Article IX, Section 9(a), Constitution of Missouri, when appropriating from general revenue to the Board of Curators for the University of Missouri, from specifying amounts for each campus.
69-77	Feb 15	CONSTITUTIONAL LAW. UNIVERSITY OF MISSOURI. GOVERNOR.	Pursuant to Article IV, Section 51, Constitution of Missouri, persons appointed by the Governor to administrative boards and commissions of the state, including persons appointed to the Board of Curators of the University of Missouri, which appointments were made while the Senate was not in session, but which appointments require confirmation by the Senate, cease to hold office after thirty days from the date the Senate next convened, if the Senate fails to act on said appointments and thereby did not give its advice and consent within thirty days after the Senate convened in special or regular session.
71-77			Withdrawn
72-77	Mar 1		Opinion letter to Mr. Theodore L. Johnson, III
76-77	Apr 20	AGRICULTURE. CORPORATIONS. FAMILY FARMS.	A corporation, incorporated for the purpose of farming and the ownership of agricultural land in Missouri, whose shares of voting stock are wholly owned and held by a family farm corporation, as defined by

			Section 350.010(5), RSMo Supp. 1975, is neither a “family farm corporation” nor an “authorized farm corporation” within the meaning of Section 350.010(2) or (5), respectively. It is our further opinion that the subsidiary corporation referred to above, which owned agricultural land and operated said land as a farm prior to September 28, 1975, may continue to engage in farming and acquire agricultural land in Missouri within the limitations imposed by Section 350.015(3). We are of the further opinion that the subsidiary corporation referred to above must file an annual report, giving the information required by Sections 350.020.1 and 350.020.4, with the Director of the Missouri Department of Agriculture.
77-77	Mar 3		Opinion letter to The Honorable James A. Franklin, Jr.
79-77	June 27	CARL. DEPARTMENT OF SOCIAL SERVICES. DIVISION OF HEALTH. CRIPPLED CHILDREN.	The method being used by the Division of Health, Missouri Crippled Children's Service, in connection with the supplying of hearing aids and custom-fitted earmolds, as above described, complies with the statutory requirements under Chapter 346, RSMo Supp. 1975.
80-77	Aug 17	WORKMEN'S COMPENSATION. COUNTY COLLECTORS.	Employees in the office of county collector of a third class county are county employees for the purposes of workmen's compensation coverage under Chapter 287, RSMo
83-77	Apr 21	OFFICERS. COMPENSATION. COUNTY BUDGET. COUNTY OFFICERS. PROSECUTING ATTORNEY.	McDonald County is liable for any unpaid balance due the prosecuting attorney of McDonald County as salary provided for by statute for the years 1975 and 1976 without regard as to whether such salary was budgeted by the county court during such years.
85-77			Withdrawn
88-77	July 19	DEPUTIES. COUNTY TREASURER.	A county court in a third class county is without authority to appoint a deputy county treasurer. A county treasurer in a third class county may appoint a deputy to perform ministerial duties at the expense only of the county treasurer. Signing checks under the provisions of Section 110.240, RSMo 1969, is a ministerial act which may be performed by a deputy county treasurer in the name of the county treasurer whose signature may be affixed by the use of a facsimile signature filed with the Secretary of State.
89-77	Apr 28	ROAD DISTRICTS. ROADS AND BRIDGES.	The county court of a third class county not under township organization form of government may appoint one road overseer for two common road districts.
91-77	June	INSURANCE.	Under Section 375.791, RSMo 1969, the Director of the Division of

	27		Insurance of the state of Missouri is not authorized to issue a certificate of authority to Lloyds, New York.
92-77	May 10	LEGISLATORS. GENERAL ASSEMBLY.	The General Assembly may authorize the use of a state owned or leased automobile by a member of the General Assembly for official use.
93-77	June 28	SCHOOLS. STATE AID.	A teachers' meeting held on the first day of a school term is to be considered a day of school operation in determining state aid under Section 163.021, RSMo Supp. 1975.
96-77			Withdrawn
97-77	May 11	MEDICAL EXAMINERS. OSTEOPATHS. DOCTORS.	The term “physician” as used in Section 58.705, RSMo Supp. 1975, refers only to physicians licensed under Chapter 334, RSMo.
98-77	May 25	CITIES, TOWNS & VILLAGES. FOURTH CLASS CITIES. POOR PERSONS.	A city of the fourth class has the authority to provide for the relief of its poor inhabitants.
101-77	Sept 28	GOVERNOR. CRIMINAL LAW. PARDON & PAROLES. CRIMINAL PROCEDURE.	A governor's unconditional pardon of a person convicted of a crime does not operate to expunge the records pertaining to such person. Nor do §§ 610.100 and 610.105, RSMo Supp. 1975, require or authorize the expungement of such records.
102-77	May 16	SCHOOLS. SCHOOL DISTRICTS.	The public school districts in this state may not use funds available to them under Part B of Title IV of the Elementary and Secondary Education Act of 1965 to provide the services described therein to nonpublic school children on nonpublic school premises. The Department of Elementary and Secondary Education may not provide assurances pursuant to Section 403(a)(3) of Title IV (20 U.S.C. § 1803(a)(3)) that Title IV funds will be used to benefit children attending nonpublic schools as required by Section 406 (20 U.S.C. § 1806).
105-77	May 17	SCHOOLS. COLLEGES. UNIVERSITIES. PUBLIC RECORDS. SUNSHINE LAW.	All records of state colleges and universities concerning faculty and staff salaries and records relating to the financial condition of such colleges and universities, except those specifically excluded by state to members of the public or federal law, must be made available upon request.
106-77	July 7		Opinion letter to The Honorable Gladys Marriott

107-77	Aug 16		Opinion letter to The Honorable Kaye Steinmetz
108-77	Apr 20	SCHOOLS. SCHOOL DISTRICTS.	Section 117.011, RSMo, which prohibits the sale of a schoolhouse or school site until another site and house are provided does not apply to a six-director school district which proposes to sell two of its six elementary schools.
109-77	June 28		Opinion letter to The Honorable Richard J. DeCoster
110-77			Withdrawn
111-77	Apr 15	SHERIFFS. CIRCUIT ATTORNEYS. PROSECUTING ATTORNEYS.	The term "prosecuting attorney" referred to in the last sentence of Section 58.715, RSMo Supp. 1975, means, as applied to the City of St. Louis, the circuit attorney of the City of St. Louis. The duties of the sheriff which are prescribed by law for coroners are to be carried out by the circuit attorney of the City of St. Louis in case of a vacancy in the office of the sheriff of the City of St. Louis.
112-77	Apr 21	JUDGES.	An incumbent magistrate judge who is presently over 76 years of age is required under the provisions of Section 476.458, RSMo Supp. 1976, to retire December 31, 1978, the end of his term.
113-77	Dec 27		Opinion letter to Mr. Stephen C. Bradford
115-77	Apr 27		Opinion letter to Dr. Arthur L. Mallory
116-77	Apr 27		Opinion letter to Dr. Arthur L. Mallory
117-77	Dec 7	STATE AUDITOR. DEPARTMENT OF MENTAL HEALTH.	The State Auditor has access to information contained in individual personnel files maintained at the Department of Mental Health and its facilities even though parts of such files may be confidential to the extent that such files relate to the duty of the Auditor to post-audit the financial condition of such institutions.
118-77	Sept 27		Opinion letter to The Honorable Wesley S. Miller
120-77	May 4	ASSESSMENTS. MOTOR VEHICLES.	Under the provisions of subsection 2 of Section 150.040, RSMo Supp. 1976, the gross amount received by the merchant for new motor vehicles is to be computed on the basis of the entire amount received from the sale of "new" motor vehicles as provided in Section 150.040(2), including the value of any trade-ins.
121-77	July 21	BANKS. STATE AUDITOR. DIVISION OF FINANCE.	The proper method of allocation of costs of bank examinations is for the Commissioner of Finance to estimate expenses pursuant to Section 361.170, RSMo 1969, and add an amount equal to fifteen percent of the estimated expenses to pay the costs of rent and other supporting services furnished by the state; and from that total amount, the Commissioner shall deduct the estimated amount of the anticipated annual income to the fund from all sources other than bank or trust

			company assessments. Then the Commissioner of Finance shall allocate and assess the remainder to the several banks and trust companies in the state on the basis of their total assets as reflected in the last preceding report called for by the Commissioner under Section 361.130, RSMo 1969.
122-77	May 24		Opinion letter to The Honorable C. E. Hamilton, Jr.
124-77	July 11		Opinion letter to The Honorable Nelson B. Tinnin
125-77	July 7	FIREMEN.	Under the provisions of Sections 87.005 and 87.006, RSMo 1969, any fireman who has complied with the provisions of these sections and succumbs to any condition of impairment of health caused by any disease of the lungs or respiratory tract, hypertension, or disease of the heart resulting in total or partial disability or death it is to be presumed that it was suffered in the line of duty unless the contrary is shown by competent evidence.
126-77	Aug 23		Opinion letter to The Honorable Donald L. Manford
127-77	May 13		Opinion letter to Dr. Arthur L. Mallory
128-77	Aug 31	COMPENSATION. COUNTY COLLECTORS. COUNTY TREASURERS.	Under Section 54.320, RSMo Supp. 1975, an ex officio collector is entitled to: A. Three percent commission on the collection and paying over of all current or delinquent corporation, merchants' tax, license, and tax on railroads and is entitled to a two percent commission on the collection and paying over of all other delinquent taxes. B. Three percent commission on the collection and paying of taxes of a telephone company regardless of whether the company pays on a current basis or pays delinquent taxes. Section 151.280, RSMo 1969, does not apply to the commissions of ex officio collectors; and Section 52.260 (14) and (15), RSMo 1969, did not apply to an ex officio collector.
129-77	May 25	LEGISLATORS. COMPENSATION.	Members of the State House of Representatives who take office after the beginning of a legislative term should have their first monthly salary prorated unless they take office on the first day of the month.
130-77	Oct 24		Opinion letter to The Honorable Wayne Goode
131-77	Nov 2		Opinion letter to Mr. James F. Walsh
134-77	Sept 27	SCHOOL FOR THE BLIND. BLIND. DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION.	School for the Blind Trust Funds may be used to finance a school for the blind facility which will serve children who are sighted but who are severely handicapped as well as children who are blind.

135-77	May 26		Opinion letter to Dr. Arthur L. Mallory
138-77	June 10		Opinion letter to The Honorable James C. Kirkpatrick
141-77	July 19	COUNTY COLLECTORS. COUNTY DEPOSITARIES.	When the county court of a third class county, under Section 52.020.2, RSMo 1969, has required the county collector to deposit all daily collections of money in depositaries selected by the county courts in accordance with Sections 110.130 through 110.150, RSMo, the county collector must make such daily deposits in such county depositaries.
145-77	June 17		Opinion letter to Dr. Arthur L. Mallory
147-77	Dec 27		Opinion letter to Mr. John M. Keane
148-77	Sept 27		Opinion letter to Mr. John M. Keane
150-77	July 8		Opinion letter to Mr. James R. Hall
151-77	July 7		Opinion letter to The Honorable Harry Wiggins
153-77	Aug 25	AGRICULTURE. AGRICULTURAL CORPORATIONS. CORPORATIONS.	A corporation which owns agricultural land in Missouri, but does not engage in farming, is not required to file an annual report with the Director of the Missouri Department of Agriculture pursuant to Section 350.020.4, RSMo Supp. 1975.
155-77	July 6		Opinion letter to The Honorable James C. Kirkpatrick
156-77	July 6		Opinion letter to The Honorable James C. Kirkpatrick
157-77	June 29		Opinion letter to The Honorable James C. Kirkpatrick
158-77	June 29		Opinion letter to The Honorable James C. Kirkpatrick
159-77	July 6		Opinion letter to The Honorable James C. Kirkpatrick
161-77	Sept 20		Opinion letter to The Honorable Donald L. Manford
162-77			Withdrawn
163-77	Oct 20	PUBLIC SCHOOL RETIREMENT SYSTEM. TEACHERS.	Under the provisions of House Bill 477 of the 79th General Assembly, effective September 28, 1977, amending Section 169.070, RSMo Supp. 1975, a member of the Public School Retirement System of Missouri with twenty-five years of creditable service, but less than sixty years of age, may retire and draw an actuarially reduced retirement allowance and the spouse named as beneficiary of a member who dies before retirement with twenty-five years of creditable service may elect to receive either survivorship benefits under option 1 of Section 169.070 as amended or a payment of the member's accumulated contributions.

164-77	Aug 23		Opinion letter to The Honorable Frank Bild
165-77	Aug 9		Opinion letter to Mr. Lowell McCuskey
166-77	Sept 27	ELECTIONS. PRIMARIES. CANDIDATES.	Declarations of candidacy for the 1978 primary election filed after the date of the 1976 November general election (November 2, 1976) and on or before the last Tuesday in April, 1978, are valid declarations of candidacy.
169-77	Aug 12	LEGISLATORS. CONSTITUTIONAL LAW. ARREST.	Section 19 of Article III of the Missouri Constitution, which excepts members of the Missouri General Assembly from arrest during a session of the Assembly, and 15 days prior to and after such session, does not apply to arrests which are criminal in nature and such legislators may be arrested during such sessions for criminal or ordinance violations.
172-77	Sept 27		Opinion letter to The Honorable Dotty Doll
173-77	Sept 27		Opinion letter to The Honorable Wendell Bailey
174-77	Dec 13		Opinion letter to The Honorable Garnett A. Kelly
176-77	Sept 28	MAGISTRATES. ELECTIONS.	Under the amendments to Article V of the Missouri Constitution, effective January 2, 1979, the chief clerk of the magistrate court of Greene County elected under Section 483.495, RSMo Supp. 1975, becomes the chief clerk of divisions of the circuit court presided over by the associate circuit judges who were judges of the magistrate court on January 1, 1979. Unless otherwise provided for by law, there will be elected a chief clerk of the Greene County magistrate court at the November General Election, 1978, and the county clerk of Greene County is required to accept declarations of candidacy for such office.
177-77	Aug 10	OFFICE OF ADMINISTRATION. CRIMINAL COSTS. PRISONERS. COUNTIES.	The per diem costs of incarceration of prisoners for which the state is responsible under the provisions of Chapter 550, RSMo, are to be determined by the Office of Administration pursuant to the provisions of Section 221.105, RSMo Supp. 1976.
178-77	Aug 10		Opinion letter to Dr. Arthur L. Mallory
179-77	Sept 28	COUNTY BUDGET.	Necessary funds required for the enforcing of House Bill No. 601, 79th General Assembly, during 1977 are automatically included within the 1977 budgets of counties of the third class.
180-77	Dec 22	PROSECUTING ATTORNEYS. DIVISION OF FAMILY SERVICES.	Pursuant to Section 2 of House Bill 601, First Regular Session, 79th General Assembly, the prosecuting attorney has authority and is required to litigate child support enforcement actions with respect to persons who are not recipients of public assistance but who have been referred by the Division of Family Services to him. The duty to litigate

			such actions includes the initiation of whatever action is necessary to enforce judgments including garnishment.
181-77	Nov 1		Opinion letter to The Honorable Henry A. Panethiere
182-77	Aug 17		Opinion letter to The Honorable Norman L. Merrell
183-77	Oct 6		Opinion letter to The Honorable Russell G. Brockfeld
186-77	Aug 22		Opinion letter to Dr. Arthur L. Mallory
188-77	Sept 30	SCHOOLS. SCHOOL DISTRICTS. SCHOOL TRANSPORTATION.	The distances set forth in Section 167.231, RSMo Supp. 1975, are to be measured from the door of the pupil's home to the door of the school along the most direct traveled route. An urban school district governed by Section 167.231 has no authority to transport pupils at district expense living less than one mile but more than one-half mile from school absent a favorable election for that purpose in accordance with that section. An urban school district governed by Section 167.231 has no authority to transport pupils at district expense who live less than one-half mile from school.
189-77	Oct 24		Opinion letter to Mrs. Carolyn Ashford
191-77	Oct 7	DEPUTIES. SHERIFFS. COUNTY COURT. COMPENSATION.	The sheriff of a first class county without a charter form of government has the exclusive authority to hire or fire deputies, assistants, and other employees in his office and to establish the compensation for his staff within the limits of the allocations made for that purpose by the county court.
192-77	Oct 24		Opinion letter to The Honorable James I. Spainhower
194-77	Sept 27		Opinion letter to The Honorable Steven M. Gardner
195-77			Withdrawn
196-77	Nov 30	LAGERS. PENSIONS. COMPREHENSIVE EMPLOYMENT AND TRAINING ACT.	1. A political subdivision which is a member of the Missouri Local Government Employees' Retirement System (LAGERS) may not withhold from LAGERS the employer's share of contributions for full-time employees whose salaries are funded through the Comprehensive Employment and Training Act of 1973. 2. The Missouri Local Government Employees' Retirement System (LAGERS) may not refund to a political subdivision the employer's contributions attributable to any such employee who terminates his employment prior to the vesting of his benefits.
199-77	Dec 28		Opinion letter to The Honorable Samuel C. Jones
201-77			Withdrawn
203-77	Nov 22	GOVERNOR. OFFICERS.	Under the provisions of Section 51 of Article IV of the Missouri Constitution, a nomination made during a session of the Senate is not

		STATE OFFICERS. CONSTITUTIONAL LAW.	subject to the constitutional thirty-day limitation in which the Senate must act since such limitation is applicable only to appointments made when the Senate is not in session. The Governor has authority to withdraw the nomination of a person made during a session of the Senate at any time prior to adjournment of the Senate if the Senate has not acted on such nomination.
204-77	Dec 29	BONDS. SCHOOLS. STATE AUDITOR.	The State Auditor does have authority to register refunding building bonds of the Sedalia School District No. 200 of Pettis County, Missouri. Our opinion is limited solely to the facts presented.
205-77	Dec 13	RECORDER OF DEEDS. UNIFORM COMMERCIAL CODE.	Section 59.310, as amended by Senate Bill No. 112, First Regular Session, 79th General Assembly, requires the print on any document to be recorded by the recorder of deeds to be 8 point and that if any document contains type smaller than 8 point such document must be accompanied by an exact typewritten copy thereof which will be recorded contemporaneously with the document.
206-77	Oct 26	NOTARY PUBLIC.	Under the provisions of Senate Substitute for House Bill No. 513, First Regular Session, 79th General Assembly, effective January 1, 1978, notaries public commissioned before January 1, 1978, and whose commissions extend beyond that date are not required to obtain the $10,000 bond required by Section 8 of such Act unless and until such notaries renew their commissions after the expiration of such terms of office. On and after January 1, 1978, such notaries are subject to the civil and criminal liability provided in Sections 32 through 38 of the Act and have statewide authority to perform notarial functions under Section 3 of the Act.
208-77	Nov 1		Opinion letter to The Honorable Allan G. Mueller
210-77			Withdrawn
211-77	Dec 22	COMPENSATION. ASSESSORS. DEPUTIES.	The county assessor of a third class county retains authority to employ deputy and other clerical personnel subject to the approval by the county court of the amount authorized notwithstanding the amendment of Section 53.071, RSMo Supp. 1975, by the provisions of Senate Bill No. 277, First Regular Session, 79th General Assembly, effective January 1, 1978.
213-77	Nov 7	COUNTY CLERKS. COMPENSATION.	The reenactment of Section 150.070 in Senate Bill 277 of the First Regular Session of the 79th General Assembly, does not authorize the payment to the county clerk of any fees from the county provided for therein. Any fees received from the state by the clerk must be paid into the county treasury.
216-77	Nov 29		Opinion letter to The Honorable Glenn H. Binger

217-77	Dec 28		Opinion letter to The Honorable Russell G. Brockfeld
219-77	Dec 30	COMPENSATION. COUNTY CLERKS.	Under the provisions of SSHB 101, First Regular Session, 79th General Assembly, effective January 1, 1978, the county clerks in each county not having a board of election commissioners are entitled to receive the additional compensation provided for in Section 2.023 of the act to be determined as of January 1, 1978, and each year thereafter.
221-77	Dec 27		Opinion letter to Mr. Stephen C. Bradford
222-77	Dec 30		Opinion letter to The Honorable Thomas M. Keyes
223-77	Nov 30	MISSOURI STATE EMPLOYEES' RETIREMENT SYSTEM. PENSIONS. COMPREHENSIVE EMPLOYMENT AND TRAINING ACT.	1. An employer which is participating in the Missouri State Employees' Retirement System may not withhold from the Retirement System the employer's share of contributions for full-time employees whose salary and fringe benefits are funded through the Comprehensive Employment and Training Act of 1973 (CETA) until such time as the benefits for such employees vest. 2. The Missouri State Employees' Retirement System may not refund to an employer the employer's contributions attributable to any such employee who terminates his employment prior to the vesting of his benefits.
224-77	Nov 30	NON-TEACHER SCHOOL EMPLOYEES' RETIREMENT SYSTEM. COMPREHENSIVE EMPLOYMENT AND TRAINING ACT. PENSIONS.	1. An employer who is participating in the Non-Teacher School Employees' Retirement System of Missouri may not withhold from the Retirement System the employer's share of contributions for full-time employees whose salaries are funded through the Comprehensive Employment and Training Act of 1973. 2. The Non-Teacher School Employees' Retirement System of Missouri may not refund to an employer the employer's contributions attributable to any such employee who terminates his employment prior to the vesting of his benefits.
226-77	Nov 30	GOVERNOR. OFFICERS. STATE OFFICERS. CONSTITUTIONAL LAW.	The Governor has authority to "withdraw" the appointment of a person made during a Senate recess before the Senate rejects the appointment or fails to approve the appointment within thirty days after the Senate has convened only if the "withdrawal" is made by removal of the appointee pursuant to Section 17 of Article IV of the Missouri Constitution. The Governor has authority to withdraw the nomination of a person made during a session of the Senate before the Senate rejects the nomination or fails to act on the nomination during such session. If, prior to withdrawal or removal, the Senate rejects either such nomination or appointment or fails to act thereon as required the appointee or nominee cannot again be reappointed or renominated to the same position. A person appointed during a recess of the Senate may resign pursuant to Section 12 of Article VII of the Constitution without prejudice and can be reappointed. A person nominated during a session may withdraw his name from consideration

			by the Senate without prejudice and can be reappointed.
228-77	Nov 14	ELECTIONS. WATER DISTRICTS. AMBULANCE DISTRICTS.	Senate Substitute for House Bill 101 of the First Regular Session, 79th General Assembly, effective January 1, 1978, repeals by implication contrary provisions of Section 247.180, RSMo Supp. 1976, relating to water district elections and of Section 190.055, RSMo Supp. 1975, relating to ambulance district elections.
229-77	Dec 29		Opinion letter to The Honorable Carole Roper Park
231-77	Dec 29	ELECTIONS. REGISTRATION. ST. LOUIS CITY.	A person appointed a deputy registration official by an election authority under the provisions of subsection 1 of Section 7.035 of Senate Substitute for House Bill No. 101, First Regular Session, 79th General Assembly, effective January 1, 1978, is not required to be a registered voter in the jurisdiction of the appointing election authority.
235-77	Dec 13		Opinion letter to The Honorable Michael A. Burke
236-77	Dec 29		Opinion letter to Dr. Richard J. Judd
237-77	Dec 19	DEPARTMENT OF REVENUE. COUNTY SALES TAX.	The October 14, 1977 notice to the director of revenue of the adoption of a countywide sales tax by St. Louis County under S.B. No. 234 is sufficient to cause the director to perform his duties under the provisions of S.B. No. 234.
238-77	Dec 29		Opinion letter to Dr. Richard J. Judd
240-77			Withdrawn
249-77	Dec 22	ELECTIONS.	After January 1, 1978, the effective date of Senate Substitute for House Bill 101, First Regular Session, 79th General Assembly, (the Comprehensive Election Act of 1977), attorneys employed by the boards of election commissioners are considered employees within the provisions of Section 2.075 of that Act which requires that employees of each board be selected in equal numbers from the two major political parties. Selection in equal numbers, however, does not require equal selection according to position classification.

STATE EMPLOYEES:
HIGHWAY PATROL:
RETIREMENT:
PENSIONS:

An employee of the state of Missouri who was employed by the Missouri State Highway Patrol from January 19, 1946 until February 24, 1946, and who then resigned to reenlist in the United States Army, and who subsequently served continuously in the United States Army until May of 1965, and who went to work for the state of Missouri in August of 1965, and has continuously been employed by the state since that time, is not entitled to receive prior state or military service credit with the Missouri State Employees' Retirement System from January, 1946 until August, 1965.

OPINION NO. 6

March 17, 1977

FILED
6

Mr. Edwin M. Bode
Executive Secretary
Missouri State Employees'
Retirement System
Post Office Box 209
Jefferson City, Missouri 65101

Dear Mr. Bode:

This is to acknowledge receipt of your request for an opinion from this office which request reads as follows:

> "Advice is requested as to whether or not an employee of the State of Missouri, who was employed by the Missouri State Highway Patrol from January 19, 1946 until February 24, 1946, and who then resigned to re-enlist in the United States Army, and who subsequently served continuously in the United States Army until May of 1965, and who then went to work for the state in August of 1965 is entitled to receive prior service credit with the Missouri State Employees' Retirement System from January 1946 until August of 1965."

In your opinion request, it is also indicated that the employee in question resigned from the Highway Patrol in February, 1946, as he was drafted into the military service. We further understand that thereafter the employee served in the

military from February 22, 1946 to June, 1965, due to his continuous reenlistment. We also understand that in August, 1965, the employee was employed by the state and has been so employed continuously since that time.

The legislation pertinent to this matter, Sections 104.340.1 and 104.340.2, RSMo Supp. 1975, provides as follows:

> "1. Any member of the system, on the first day of the first month following the effective date of sections 104.310 to 104.550, shall be given credit for prior service with the state. All such service must be established to the satisfaction of the board.
>
> "2. Any member, on the first day of the first month following the effective date of sections 104.310 to 104.550, shall be entitled to creditable prior service within the meaning of sections 104.310 to 104.550 for all active military service performed in the United States Army, Air Force, Navy, Marine Corps, Coast Guard and members of the United State Public Health Service when in the active military service, or any women's auxiliary thereof in time of active armed warfare, if such member was a state employee immediately prior to his entry into the armed services and became an employee of the state within ninety days after termination of such service under honorable conditions or release to inactive status in a reserve component of the armed forces. This includes (1) members of the reserve component of the armed forces (National Guard of the United States, United States Army Reserve, Air National Guard of the United States, United States Air Force Reserve, United States Naval Reserve, United States Marine Corps Reserve, United States Coast Guard), (2) reserve components existing prior and subsequent to the date of sections 104.310 to 104.550 and (3) the Reserve of United States Public Health Service, while in the active military service of the United States."

We believe that Attorney General Opinion No. 305, rendered December 13, 1972, a copy of which we enclose, is controlling in

this matter, both on the issue of whether the employee in question is entitled, pursuant to Section 104.340.1, to credit for prior state service from January 19, 1946 until February 24, 1946, and on the issue whether he was entitled to credit for prior military service, pursuant to Section 104.340.2 for his service in the military from February, 1946 to June, 1965. In that opinion, it was held that an employee of the state of Missouri who terminated such employment on July 31, 1957, then returned to employment by the state on January 13, 1969, and who had since continuously remained in such employment, was not entitled to service credit for his state employment prior to July 31, 1957, as the individual was neither employed by the state nor a member of the Missouri State Employees' Retirement System on September 1, 1957. The opinion noted that although the original Section 104.340 had been enacted in 1957, repealed and reenacted in 1959, and repealed and reenacted in 1972 as the current effective Section 104.340, RSMo Supp. 1975, a person had to be a member of the Missouri State Employees' Retirement System on September 1, 1957, to receive credit for prior service with the state.

Thus, the employee in question in this matter could not receive credit for his prior state service from January 19, 1946 until February 24, 1946, as he was neither employed by the state nor a member of the State Employees' Retirement System on September 1, 1957. Further, the employee in question in this matter is not entitled to receive credit for his prior military service from February, 1946 to June, 1965, as again, the individual in question was not a member of the Missouri State Employees' Retirement System on September 1, 1957. The analysis provided in Attorney General Opinion No. 305 as to Section 104.340.1 is equally applicable to Section 104.340.2, and therefore the controlling date for determining an employee's entitlement to prior military service credit is September 1, 1957.

CONCLUSION

It is therefore the opinion of this office that an employee of the state of Missouri who was employed by the Missouri State Highway Patrol from January 19, 1946 until February 24, 1946, and who then resigned to reenlist in the United States Army, and who subsequently served continuously in the United States Army until May of 1965, and who went to work for the state of Missouri in August of 1965, and has continuously been employed by the state since that time, is not entitled to receive prior state or military service credit with the Missouri State Employees' Retirement System from January, 1946 until August, 1965.

Mr. Edwin M. Bode

The foregoing opinion, which I hereby approve, was prepared by my assistant, Greg Hoffmann.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Enclosure: Op. No. 305
12/13/72, Bode

LICENSES:
NURSING HOMES: The Board of Nursing Home Administrators is required to assess and collect a fee of $50 prior to the examination of an applicant for license and the Board may not waive this fee when an applicant is reexamined on part of the examination.

OPINION NO. 8

June 6, 1977

FILED
8

Mr. James Walsh, Director
Department of Social Services
Broadway State Office Building
Jefferson City, Missouri 65101

Dear Mr. Walsh:

This is in response to the request of your predecessor for an official opinion of the Attorney General on a question pertaining to the operation of the Missouri Board of Nursing Home Administrators in the Department of Social Services.

The question was raised in the Report of the State Auditor on his audit of the Board for the biennium ending June 30, 1976, and is described by the Auditor as follows:

> "In order to obtain a license the nursing home administrator must pass a two-part examination. There is a $50 fee for taking the exam. One part of the examination is a national exam purchased from a national testing service. The other part of the exam is a state exam developed by the state board.
>
> "If the national portion of the exam is not passed and is later retaken, the $50 fee is again assessed. If the state portion of the exam is not passed and is later retaken, no additional fee is required. The exemption of the fee for retaking the state portion of the exam may be in violation of Section 344.030(2), RSMo 1975 Supp."

Section 344.030, RSMo Supp. 1975, provides in material part:

> "1. Before any person is licensed as a nursing home administrator in this state, he shall apply for a license and furnish the Missouri board of nursing home administrators with

> satisfactory proof that he . . . has passed an examination to the satisfaction of the examining board. . . .
>
> "2. Upon meeting the requirements of subsection 1 and the payment of a fee of fifty dollars to the director of revenue, the applicant shall be examined by the Missouri board of nursing home administrators, or a committee thereof, under such rules and regulations as the board may determine, . . ."

It is our opinion that this statute makes imposition of a $50 fee mandatory prior to each and every licensure examination conducted by or on behalf of the Missouri Board of Nursing Home Administrators. We do not believe the Board is authorized by rule or regulation or otherwise to designate a part of the examination as subject to the statutory fee and another part of the examination under certain circumstances as exempt from the statutory fee.

CONCLUSION

It is the opinion of this office that the Board of Nursing Home Administrators is required to assess and collect a fee of $50 prior to the examination of an applicant for license and the Board may not waive this fee when an applicant is reexamined on part of the examination.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Louren R. Wood.

Yours very truly,

JOHN ASHCROFT
Attorney General

COORDINATING BOARD FOR HIGHER EDUCATION:
STATE ANATOMICAL BOARD:
REORGANIZATION ACT:

Monies received by the State Anatomical Board are to be deposited in the state treasury. Expenditures are to be made by such board from appropriations by the General Assembly.

OPINION NO. 10

April 7, 1977

FILED
10

Mrs. Virginia Young, Chairman
Coordinating Board for Higher Education
600 Clark Avenue
Jefferson City, Missouri 65101

Dear Mrs. Young:

This is in response to your request for an opinion on the question of whether the State Anatomical Board can properly retain exclusive custody and control of the funds it receives and disburses pursuant to Sections 194.120 through 194.180, RSMo 1969, thereby avoiding the established accounting, purchasing and revenue systems that apply to most state agencies.

The State Anatomical Board is comprised of "heads of departments of anatomy, professors and associate professors of anatomy" at Missouri educational instiutions in which human anatomy is investigated or taught, and the principal function of the board is to distribute dead human bodies to the participating educational institutions. Section 194.120, RSMo 1969. Section 194.130(2) authorizes the board to adopt its own bylaws, select its own officials and agents and determine their compensation. The funds received and disbursed by the board are described as follows:

> "Each educational institution accepting the provisions of sections 194.120 to 194.180 shall remit to the board a sum to be fixed and determined by the board; said sum shall be in proportion to the total number of students in attendance at said educational institutions as set forth in the affidavit provided for in section 194.140, or so much per capita for each of said students within sixty days after the beginning of each term. The funds so received shall be used in providing for the expense incurred in the conduct

> of the affairs of the board, and the board shall have the exclusive custody and control of such funds and their disbursements." Section 194.130(3), RSMo 1969. (Emphasis added)

You state in your opinion request that the General Assembly makes no appropriation for the operation of the State Anatomical Board and that the board maintains a private bank account for the deposit and disbursement of funds it controls pursuant to Section 194.130(3). You also state that the latest audit of the Department of Higher Education contains the following comment:

> "'This practice circumvents the state accounting, purchasing, and revenue systems and also apparently violates Section 30.240, RSMo, which states, the state treasurer shall hold all state monies, all deposits thereof, time as well as demand, and all obligations of the United States government in which such monies are placed for the benefit of the respective funds to which they belong and disburse the same as authorized by law.'"

In addition to Section 30.240 to which the auditor has referred, Article IV, Section 15 of the Missouri Constitution requires all state funds to be deposited in the state treasury. Furthermore, Section 33.080, RSMo 1969, requires public officials to deposit in the state treasury any monies received pursuant to law:

> "All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals of not more than thirty days, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the general assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated."

The foregoing constitutional and statutory provisions require the deposit of state funds in the state treasury, under the control of the state treasurer, and subject to legislative appropriation. These provisions appear to conflict, therefore, with

Section 194.130, which purports to authorize the State Anatomical Board to retain "exclusive custody and control" of the funds it receives and disburses. We need not resolve this conflict, however, because an entirely different question is presented when we consider the effect of the Omnibus State Reorganization Act of 1974, Appendix B, RSMo Supp. 1975.

Section 6.6 of that act transfers the State Anatomical Board to the Department of Higher Education by a type II transfer. A type II transfer is defined as follows:

> "(b) Under this act a type II transfer is the transfer of a department, division, agency, board, commission, unit, or program to the new department in its entirety with all the powers, duties, functions, records, personnel, property, matters pending, and all other pertinent vestiges retained by the department, division, agency, board, commission, unit or program transferred subject to supervision by the director of the department. Supervision by the director of the department under a type II transfer shall include, but shall be limited to: budgeting and reporting under subdivisions (4) and (5) of subsection 6 of this section; to abolishment of positions, other than division, agency, unit or program heads specified by statute; to the employment and discharge of division directors; to the employment and discharge of employees, except as otherwise provided in this act; to allocation and reallocation of duties, functions and personnel; and to supervision of equipment utilization, space utilization, procurement of supplies and services to promote economic and efficient administration and operation of the department and of each agency within the department. Supervision by the director of the department under a type II transfer shall not extend to substantive matters relative to policies, regulative functions or appeals from decisions of the transferred department, division, agency, board, commission, unit or program, unless specifically provided by law. The method of appointment under type II transfer will remain unchanged unless specifically altered by this act or later acts." Reorganization Act, Section 1.7(1(b)).

Accordingly, all the "powers, duties, functions, records, personnel, property, matters pending, and all other pertinent vestiges" of the State Anatomical Board are transferred and subject to the supervision of the Director of the Department of Higher Education, i.e., the Commissioner of Higher Education. (See Sections 1.6 (3) and 6.2 of the Reorganization Act.)

Pursuant to the definition of a type II transfer, the supervision of the commissioner of higher education includes the budgeting and reporting responsibilities provided in Sections 1.6 (4) and 1.6(5) of the Reorganization Act. Section 1.6(4) vests in the head of the department of higher education, i.e., the Coordinating Board of Education (see Section 6.2, Reorganization Act), the exclusive budget making powers for any "board" within the Department of Higher Education, which now includes the State Anatomical Board. The State Anatomical Board, therefore, must annually "present its estimates of requirements" to the Coordinating Board for review, modification, consolidation and ultimately submission to the General Assembly in conjunction with appropriation requests for the Department of Higher Education.

To give effect to this type II transfer will sharply curtail the autonomy that the Anatomical Board has enjoyed since its inception; essentially, we must determine whether Section 6.6 of the Reorganization Act can be construed as repealing by implication that part of Section 194.130(3) which purported to authorize the Anatomical Board to retain exclusive custody and control of the funds received from educational instutions and disbursements made by the Anatomical Board. Although repeals by implication are not favored, Graves v. Little Tarkio Drainage Dist. No. 1, 134 S.W.2d 70 (Mo. 1939), we have no alternative but to conclude that the legislature, by providing for a type II transfer, intended to subject the fiscal operations of the Anatomical Board to the supervision of one of the executive departments of state government.

The stated purpose of the Reorganization Act is to improve accountability and to provide for the most efficient and economical operations possible in the administration of the executive department of state government. Subjecting the operations of the State Anatomical Board to the supervision of the Department of Higher Education and ultimately to the scrutiny of the legislature through the appropriations process can be said to further the objectives of the Reorganization Act. It should be noted, however, that the primary consequence of the type II transfer relates to fiscal matters, employment, equipment and space utilization, and the procurement of supplies and services; pursuant to a type II transfer, the supervision by the Department

of Higher Education "shall not extend to substantive matters relative to policies [or] regulative functions . . ." (see Section 1.7(1(b)).

CONCLUSION

It is the opinion of this office that monies received by the State Anatomical Board are to be deposited in the state treasury. Expenditures are to be made by such board from appropriations by the General Assembly.

Very truly yours,

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

December 30, 1977

OPINION LETTER NO. 13

FILED
13

Mr. Owens Lee Hull, Jr.
Presecuting Attorney of Platte County
P. O. Box B
Platte City, Missouri 64079

Dear Mr. Hull:

This letter is in response to your request asking whether it is lawful for a county court of a second class county to obtain false arrest insurance to insure against false arrest by the sheriff's deputies of that county.

You also refer to our Opinion No. 92, dated November 14, 1951 to Veatch, in which this office held that a county court has no authority to help defray the expense of a group insurance plan on the elected officers or employed personnel of that county. Such opinion was withdrawn when this office issued Opinion No. 93, dated September 9, 1969 to Cason, in which it was held that a school board has the authority to purchase an individual liability insurance policy on an employee to cover his negligence occurring during the normal activities of the school district as part of his compensation. A copy of that opinion is enclosed. We also enclose Opinion No. 11, dated April 6, 1971, to Copeland wherein this office held that it was our view that the statutory authorization to provide "compensation" or "salary" for an employee includes the authorization to purchase insurance for an employee as a part of the "compensation" or "salary" of the employee. We therefore concluded that under Section 57.250, RSMo, which relates to the

compensation of deputy sheriffs of third and fourth class counties, a judge of the circuit court may in his discretion authorize by court order the payment of a hospitalization insurance policy as a part of the compensation of deputies provided for under that section.

The appointment of deputies of second class counties is covered by Section 57.220 RSMo. Under that section deputies are appointed by the sheriff but no appointment becomes effective until approved by the judges of the circuit court of the county. The judges of the circuit court of such county by agreement with the sheriff fixes the salary of such deputies. Under Section 57.230, RSMo, the county court pays such deputies salaries.

We are therefore of the view that false arrest insurance may be purchased for such deputies as a part of their compensation, pursuant to the provisions of Section 57.220, by agreement between the judges of the circuit court and the sheriff.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Enclosures: Op. No. 93
9/9/69, Cason

Op. No. 11
4/6/71, Copeland

CREDIT UNIONS:
CONSUMER AFFAIRS, REGULATION, AND LICENSING: A credit union in possession is not required to pay for the operating expense and compensation of a regular employee of the Division of Credit Unions who, as a part of his official duties, is operating the credit union in possession on behalf of the Director of the Division of Credit Unions.

OPINION NO. 14

April 27, 1977

FILED
14

Mr. James Sullivan, Director
Department of Consumer Affairs,
Regulation, and Licensing
505 Missouri Boulevard
Jefferson City, Missouri 65101

Dear Mr. Sullivan:

This answers the opinion request of former department director Alfred C. Sikes reading as follows:

> "Is a credit union, which the State Division of Credit Unions has taken charge, required to pay a State employee's expense and compensation for the time the State employee is serving as agent of the credit union?"

Section 370.150.3, RSMo 1969, provides:

> "During the time the commissioner is in possession, or acting as receiver as hereinafter set forth in section 370.152, he shall have the power to operate the credit union through the agency of a qualified person, natural or corporate, who shall act under his supervision, and all expenses of the operation, including compensation of the agent and the employees of the agent, shall be paid from the credit union's funds." (Emphasis added)

Under Section 4.7(1), Omnibus Reorganization Act of 1974, Appendix B, RSMo Supp. 1975, the Office of the Supervisor of Credit Unions is abolished and all of his powers, duties, and functions in Chapter 370, RSMo, and the powers and duties relating to credit unions vested in the Commissioner of Finance in Chapter 370, RSMo, are transferred to the Division of Credit Unions under a director who has been nominated by the department

director of Consumer Affairs, Regulations, and Licensing and appointed by the Governor with the advice and consent of the Senate.

In response to Mr. Sikes' question, we feel it is necessary to first consider whether the legislature contemplated the appointment of a full-time employee of the Division of Credit Unions to act as an agent in possession under Section 370.150.3. In seeking legislative intent, the basic rule of statutory construction is to ascertain the intent from the words used in the statute. In so doing, the words should be given their plain and ordinary meaning in order to promote the object and manifest purpose of the statute. State ex rel. State Highway Commission v. Wiggins, 454 S.W.2d 899 (Mo.Banc 1970).

Significantly, the Director of the Division of Credit Unions may appoint a deputy supervisor, examiners, assistant examiners, and other employees under Section 370.100.5, RSMo Supp. 1975. All persons appointed by the division director as authorized by Chapter 370 shall perform the duties required of them by the director and "shall devote all of their time to their official duties." Section 370.100.8, RSMo Supp. 1975.

Under appropriate circumstances, one of the official duties of the division director is to take possession of the credit union. Section 370.150.1, RSMo 1969. His office obviously can operate the credit union without the appointment of the agent under Section 370.150.3. By virtue of Section 370.100.8, employees under him shall perform the duties he requires with regard to the possession.

The plain language of Section 370.150.3 is that the director of the division shall have the power to operate the credit union through the agency of a qualified person, natural or corporate, who shall act under his supervision. The legislature is not presumed to have attended to use superfluous or meaningless words in its enactments. Dodd v. Independence Stove & Furnace Co., 51 S.W.2d 114 (Mo. 1932). Regular division employees are already acting under the supervision of the director; therefore, to say that Section 370.150.3 contemplates that a regular employee of the division is an agent referred to in this section is to ignore the language "who shall act under his supervision."

Further, this section speaks in terms of "compensation of the agent and the employees of the agent." Such language must be read in light of Section 370.100.8 requiring employees of the division to perform the duties assigned to them by the director and to devote all of their time to such duties. It is not contemplated that the regular employees of the division have their

own "employees" for performing their official duties. To hold otherwise would appear to be unreasonable.

It is important to note that there are specific instances where the legislature has indicated that a director may use a regular employee in a liquidating capacity. Section 361.390, RSMo 1969, permits the Commissioner of Finance to:

> ". . . appoint one or more special deputy commissioners as agent or agents to assist him in liquidating the business and affairs of any corporation in his possession."

Section 361.400, RSMo 1969, clearly indicates that a deputy commissioner or examiner may be appointed as a special deputy under Section 361.390.

Moreover, in the instances where the legislature apparently intended that the compensation and expenses of a statutorily appointed agent be paid from the assets of a business institution which is suffering financial difficulty, such intent has been expressly manifested. For example, Section 369.349.8, RSMo Supp. 1975, provides:

> "The director of the division of savings and loan supervision may appoint one or more special deputies to assist in the duties of liquidation and distribution and may also employ such special legal counsel, accountants and assistants as may be needed and required and fix their salaries and compensation subject to the approval of the court. All such salaries and compensation and such reasonable and necessary expenses as may be incurred in the liquidation shall be paid by the director of the division of savings and loan supervision from the funds of the association in his hands. Such expenses shall include that part of the salary of the director of the division of savings and loan supervision and of his deputies, examiners, accountants and other assistants and that part of the general expenses of the director of the division of savings and loan supervision's office as fairly represent, in the opinion of the director of the division of savings and loan supervision, the proportion properly attributable to such liquidation." (Emphasis added)

See also Section 361.410, RSMo 1969, with regard to the payment of compensation of the deputy commissioners who are special deputies of the Commissioner of Finance for the purpose of liquidation.

Of equal significance is that under Section 4.7(2), Omnibus Reorganization Act of 1974, Appendix B, RSMo Supp. 1975, is the following language:

> ". . . In addition the director of the division of credit unions shall assess the several credit unions in the state the same percentage of estimated expenses to pay the costs of rent and other supporting services furnished by the state, as banks and trust companies are assessed by the commissioner of finance pursuant to section 361.170(1), RSMo."

It is noted that in enacting this provision of the reorganization bill the legislature did not adopt Section 361.170.2, RSMo 1969, as a part of the credit union law. Section 361.170.2 provides for the charging to a corporation under the Commissioner of Finance any unusual expenses incurred outside the normal expenses of annual or special examinations.

When all the statutes in the area of financial institutions are considered together in pari materia in an effort to ascertain the legislative intent, it appears to this office that the legislature did not intend that the word agent in Section 370.150.3 encompass a regular employee of the Division of Credit Unions.

CONCLUSION

It is the opinion of this office that a credit union in possession is not required to pay for the operating expense and compensation of a regular employee of the Division of Credit Unions who, as a part of his official duties, is operating the credit union in posssession on behalf of the Director of the Division of Credit Unions.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Terry C. Allen.

Yours very truly,

John Ashcroft

JOHN ASHCROFT
Attorney General

OFFICES OF THE

JOHN ASHCROFT
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

(314) 751-3321

February 2, 1977

OPINION LETTER NO. 15

Robert H. Daugherty, Acting Director
Department of Consumer Affairs,
Regulation and Licensing
505 Missouri Boulevard
Jefferson City, Missouri 65101

Dear Mr. Daugherty:

This is in response to a request of your predecessor for an opinion for the director of the Division of Credit Unions concerning the proper handling of an account in an ongoing credit union of a deceased member. We understand that a credit union has paid such an account to the director of credit unions. We find that the director of credit unions is not the proper person to receive this account since he has no statutory responsibilities with respect to the unclaimed accounts of an ongoing credit union. Specifically, Section 361.200, RSMo, which provides that the director shall hold the accounts of unlocated shareholders of liquidated credit unions does not apply since the credit union in question is an ongoing institution.

Therefore, the money held by the director which he received from the credit union should be returned to the credit union.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

February 1, 1977

OPINION LETTER NO. 16
Answer by Letter - Lindholm

FILED
16

Mr. Kenneth Karch
Deputy Director
Department of Natural Resources
1014 Madison Street
Jefferson City, Missouri 65101

Dear Mr. Karch:

This is in response to a request by the former Director of the Department of Natural Resources for a letter opinion concerning whether binding assurances can be given by the State of Missouri for repayment of nonfederal water supply costs in federal reservoirs pursuant to Chapter 256, RSMo 1969.

Based on our earlier conversations, I understand your question to be directed to the authority of the state to give such assurances in anticipation that it will soon be requested to do so with relation to several proposed federal water projects within the state.

In order to answer this question it becomes necessary to determine what is meant by assurances. For if by "assurances" one means merely a prognostication of future events by the state, which creates no liability for the state if its forecast proves incorrect, the answer would differ from that which we must give if "assurances" is interpreted to create a binding obligation, a liability, should the needs forecast in the assurances, and the consequent revenues from local water users to pay nonfederal costs, not materialize, and the state thereby become liable to pay these costs.

Under Section 256.300, RSMo 1969, it is clear that the legislature intended that the state should have the authority to give "reasonable assurances" in connection with federal projects constructed under the federal laws referenced in Section

256.290, RSMo 1969. Section 256.300, pertaining to the old abolished water resources board (whose duties have been passed to the Department of Natural Resources by Section 10.3 of the recent Reorganization Act, Appendix B, RSMo Supp. 1975.), reads as follows:

> "The water resources board is authorized to make reasonable assurance that demands for use will be made within a period of time to permit payment of costs allocated to water supply within the life of the project, and upon receipt of specific appropriations from the fund may enter into contract with the appropriate federal departments for purposes of discharging nonfederal responsiblities relating to municipal and industrial water supply storage as permitted by applicable federal legislation on water resource projects and, in so doing, shall consider the projected water needs of the area that can be served by the project and shall also consider the ability of future users to reimburse any investment of funds that may be made by this state."

The fund from which this section anticipates future appropriations is the water development fund established under the terms of Section 256.290, RSMo, which reads as follows:

> "The general assembly of Missouri may transfer money from the general revenue fund to the 'Missouri Water Development Fund', which is hereby created, and may appropriate money from the fund for the purposes of purchasing municipal and industrial water supply storage in public works projects as permitted by the Water Supply Act of 1958, P.L. 85-500, 85th Congress, as amended by the Federal Water Pollution Control Act amendments of 1961, P.L. 87-88, 87th Congress and by P.L. 534, 78th Congress (58 statutes at large, C 665) or under other applicable federal legislation, or to purchase municipal and industrial water supply storage in works constructed with federal assistance under authority of the Watershed Protection and Flood Prevention Act, P.L. 566, 83rd Congress, as amended by P.L. 1018, 84th Congress, or under other applicable federal legislation. The fund shall be a continuing fund and as such shall be exempt from the provisions of section 33.080, RSMo."

Mr. Kenneth Karch, Deputy Director

A thorough search fails to reveal any cases construing the provisions of these two sections pertaining to assurances. However, a careful reading of the two sections indicates that the legislature carefully separated the matter of assurances from binding contracts based on specific appropriations from the fund. It stated in Section 256.300 that assurances, apparently merely predictive, could be made without appropriation, but that contracts to discharge nonfederal water supply storage responsibilities could be made only upon receipt of appropriations from the water development fund. Similarly, Section 256.290 clearly indicates that any funds expended for purchases of water storage be by appropriation. The clear implication of this separation is that the legislature intended that the assurances only be the state's best estimates or forecast of demands, and that the state could enter into binding contracts only pursuant to specific appropriations from and limited by the water development fund, and not by the general assurances without specific project appropriations.

In conclusion, it is the opinion of this office that while the Clean Water Commission may make nonbinding assurances which merely predict future water supply needs and uses, these assurances cannot, under the provisions of Chapter 256, RSMo 1969, bind the State of Missouri to repay nonfederal water supply costs connected with federal water reservoirs.

Very truly yours,

JOHN ASHCROFT
Attorney General

August 25, 1977

OPINION LETTER NO. 17
Answer by letter-Allen

FILED
17

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

This letter is in response to your opinion request asking:

> "1. Does the Secretary of State have the authority, and is he obligated, under section 446.180 RSMo, to issue a corrected patent upon the proofs outlined in the statute being presented to him?
>
> "2. Considering the proofs presented and attached hereto as exhibits, can and should the Secretary of State issue a patent correcting the original patent to one C. F. Holly? What form should the corrected patent take. Should it be filed for record, and if so, in what location?"

You have enclosed various exhibits for our examination. This office previously issued Opinion No. 89 dated January 3, 1951, to Walter H. Toberman, the then Secretary of State, in which we concluded that the Secretary of State may issue a corrected patent for land in cases in which the land was erroneously described in the original patent from the state after a proper showing is made. A copy of that opinion is attached, and you will note that it goes into some detail as to the procedure to be followed.

Having examined the file in this case, it is our view that the records furnished to us indicate that the original land patent issued to C. F. Holly was in error in that it granted said C. F.

Holly and his heirs the Southwest Quarter (SW¼) of Section 18, Township 60, Range 30, purportedly containing eight-five and sixteen hundredths (85.16) acres for a consideration of one hundred six dollars and four cents ($106.04), whereas the grant should have been for the West half (W½) of the Southwest Quarter (SW¼) of Section 18, Township 64, Range 30. We also note that there was a slight error in the patent issued with respect to the amount of the consideration in that the amount computed at the required one dollar and twenty-five cents ($1.25) per acre for the acreage recited should have been one hundred six dollars and forty-five cents ($106.45) and not one hundred six dollars and four cents ($106.04). It would be impractical to attempt to resolve any questions raised by this deficiency.

We have examined the copies of the documents which you forwarded to us, and it is our view that the corrected patent should be issued pursuant to Section 446.180, RSMo 1969, because the persons making application for the issuance of a corrected patent have met the conditions and requirements of said section. Based on an abstract of title, prepared and sworn to by Edward M. Manring, attorney at law, Albany, Missouri, said applicants have acquired the title to the property from C. F. Holly, original patentee, by mesne conveyances as required by Section 446.180.

We have further concluded that the corrected patent should issue to C. F. Holly and his heirs and assigns. This is consistent with Opinion No. 89 dated May 12, 1953 to Walter H. Toberman, wherein it is the view of this office that corrected patents may be issued to the original patentee when the land under the patent has been subsequently divided into several parcels. A copy of that opinion is attached for your information.

We have enclosed the corrected patent which requires execution as indicated and transmission to the attorney for the applicants. You should retain a duplicate for your files. We assume you have the original documentary proof supplied by the applicants under Section 446.180.

Yours very truly,

JOHN ASHCROFT
Attorney General

Enclosures

CRIMINAL LAW:
LOTTERIES:
GAMBLING:

(1) Section 563.374, RSMo 1969 would not prohibit the printing of advertisements or other promotional material in Missouri for use in consumer sweepstakes conducted outside this state when the printed material is shipped directly to the out-of-state locations. (2) Section 563.430, RSMo 1969 and Section 563.440, RSMo 1969 do not apply to or prohibit the printing of advertisements or promotional material in Missouri for use in consumer sweepstakes conducted outside the state when the printed material is shipped directly to the out-of-state locations.

OPINION NO. 20

January 14, 1977

FILED
20

Honorable James F. Conway
Missouri Senate, District 6
c/o Senate Post Office
State Capitol
Jefferson City, Missouri 65101

Dear Senator Conway:

This is in reply to your request for an opinion of this office concerning the applicability of Section 563.374, RSMo 1969, Section 563.430, RSMo 1969, and Section 563.440, RSMo 1969, to advertisements and other promotional material for a consumer sweepstakes printed in Missouri but shipped out of the state for use elsewhere. Your specific questions in this regard are as follows:

> "1. First, would the printing of these materials violate Section 563.374, R.S.Mo., which provides, in part, that any person 'who shall sell, store, possess or transport except in interstate commerce any . . . lottery tickets . . . or any other evidence of transactions incident to a lottery . . . shall be deemed guilty of a misdemeanor . . .'?
>
> "2. Section 563.430 seems to prohibit the advertisement of a lottery by any medium printed or circulated in Missouri, whether or not the lottery will be conducted in Missouri. We would like your opinion as to whether this section (or any other provisions of Missouri law) prohibit the printing of advertisements for an

> out-of-state lottery, if the advertisements are neither circulated nor published in Missouri.
>
> "3. Moreover, does the assessment of a fine under Section 563.440 against any person who 'shall advertise or cause to be advertised for sale, or who shall print or publish an advertisement, or shall aid or assist, or be in anywise concerned in the sale or exposure of the sale of any lottery ticket or tickets . . . within this state or elsewhere . . .' apply to the transaction above described?
>
> "4. Lastly, if in your opinion the cited statutes do prohibit the transactions described can such statutes constitutionally be applied to prohibit the transactions herein described or would such an application be an unconstitutional abridgement of interstate commerce?"

As background to the above inquiries you have informed us as follows:

> "A nationally known Missouri corporation in connection with the promotion of its nationally known product, from time to time conducts consumer sweepstakes in states other than Missouri permitting such consumer games. We are assuming for purposes of this request that the sweepstakes would not be permitted in the State of Missouri. The company does not intend to advertise or conduct the sweepstakes in Missouri or other states where not permitted by local law. The company has obtained a favorable opinion from the federal postal authorities that the sweepstakes does not violate federal lottery laws.
>
> "The corporation would prefer to employ Missouri printers to print advertising and other promotional material used in connection with the sweepstakes, if that can be done without violating Missouri law. The materials could, if necessary, be shipped directly by the printers in sealed containers to the out-of-state locations where such materials would

> be used. We would appreciate an expression of opinion from your office concerning whether printing within Missouri of these advertisements and lottery promotional material for use outside the State of Missouri would violate the Missouri statutes that forbid sale, possession, or transportation of gaming devices and the sale or advertisement of the sale of lottery tickets."

Section 563.374 provides as follows:

> "Every person who shall sell, store, possess or transport except in interstate commerce any punchboard, slot machine, lottery ticket, roulette wheel, policy slip, book, list of numbers or any other evidence of transactions incident to a lottery, or any other gambling device, equipment or article, shall be deemed guilty of a misdemeanor. All such equipment, devices and articles are hereby declared contraband and may be seized by any peace officer to be disposed of as herein provided."

In Opinion No. 5 issued to Harold Bamburg on August 15, 1952, this office interpreted the provisions of the above statute in a factual context very similar to the one presented in your opinion request. The opinion stated that the selling, storing, possession and transportation in interstate commerce of any article incident to a lottery was not prohibited by Section 563.374. We believe that the reasoning of that opinion is equally applicable to the fact situation described in your request, and we conclude that Section 563.374 would not prohibit the printing of advertisements or other promotional material in Missouri for use in consumer sweepstakes conducted outside the state when the printed material is shipped directly to the out-of-state locations.

This office has also examined Sections 563.430 and 563.440 to determine their applicability to this fact situation.

Section 563.430 provides as follows:

> "If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a

> business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months, provided, however, that this section shall apply only where there is consideration in the form of money, or its equivalent, paid to or received by the person awarding the prize."

Section 563.440 provides as follows:

> "Any person who shall sell or expose to sale, or cause to be sold or exposed to sale, or shall keep on hand for the purpose of sale, or shall advertise or cause to be advertised for sale, or who shall print or publish an advertisement, or shall aid or assist, or be in any wise concerned in the sale or exposure to sale of any lottery ticket or tickets, or any share or part of any lottery ticket in any lottery, or device in the nature of a lottery within this state or elsewhere and shall be convicted thereof in any court of competent jurisdiction, shall, for each and every offense, forfeit and pay a sum not exceeding one thousand dollars."

The primary rule of construction in regard to criminal statutes is that they are to be construed strictly and given no broader application than is warranted by their plain and unambiguous terms. State v. Raccagno, 530 S.W.2d 699 (Mo. 1975); State v. Alderman, 500 S.W.2d 35 (Mo.Ct.App. at Spr. 1973); State v. Wilbur, 462 S.W.2d 653 (Mo. 1971).

As a consequence of the above guidelines, the rule has developed that a criminal statute should not be construed to include

individuals other than those specifically enumerated in the law. This rule was set out in State v. Hall, 351 S.W.2d 460 (K.C.Mo. App. 1961), when the court stated:

> ". . . A criminal statute is not to be held to include offenses or persons other than those which are clearly described and provided for both within the spirit and letter of the statute, . . ." Id. at 463.

See State v. McClary, 399 S.W.2d 597 (K.C.Mo.App. 1966).

An analysis of Section 563.430, RSMo, leads us to the conclusion that it applies to making, establishing, advertising, etc., lotteries in the state of Missouri whether the lottery is conducted within Missouri or outside this state. For instance, it would be illegal to advertise in Missouri a lottery conducted in another state, even if the lottery was legal in the other jurisdiction. However, we do not believe that the terms of the statute would prohibit the manufacture of articles relating to a consumer sweepstakes conducted outside Missouri when the articles are shipped directly in interstate commerce after their manufacture, and not used within this state for any purpose.

Section 563.440, RSMo, prohibits selling, advertising for sale, etc., any lottery ticket or device in the nature of a lottery, whether the lottery is conducted in this state or elsewhere. And, although this section differs from Section 563.430 in that it contains the phrase ". . . or who shall print or publish an advertisement . . .", we do not believe that this proviso in Section 563.440 would prohibit the printing of advertisements or other promotional material for a consumer sweepstakes conducted outside Missouri when the material is shipped directly in interstate commerce after it is printed, and not used in this state for any purpose.

The terms "print" and "printed" have been interpreted in a variety of ways by the Missouri Supreme Court. For instance, in the case of In re Publishing Docket in Local Newspaper, 187 S.W. 1174 (Mo. Banc 1915), the court held the word "print" in a statute relating to the Supreme Court docket to mean the making of an impression with inked type. In reaching this result, the court distinguished the meaning of the term "print" from that of the word "publish", and concluded that under the provisions of the statute in question, it was not necessary to publish the docket in a local newspaper. Likewise, in the case of Ackerman v. Globe-Democrat Publishing Company, 368 S.W.2d 469 (Mo. 1963), the court distinguished the term "print" from the term "publish"

as it was used in the context of that case. However, in the case of In re Publication of Docket of Supreme Court, 232 S.W. 454 (Mo. Banc 1921), the court completely reversed its decision in In re Publishing Docket in Local Newspaper, supra, and adopted the dissenting opinion from the latter case as the holding of the court. In effect, the court in In re Publication of Docket of Supreme Court, supra, held that the word "print" was susceptible to a variety of meanings, and in the context of its use in the statute relating to the Supreme Court docket, the term included the publication of the docket in a local newspaper. The positions taken by the court with respect to the meaning of the word "print" clearly show that the term has a variety of meanings depending upon the context in which it is used. See In re Publication of Docket of Supreme Court, supra; State ex rel. Page v. Vossbrinck, 257 S.W.2d 208 (St.L.Ct.App. 1953).

It seems clear that the purpose of Section 563.440 is to prevent a person from selling or advertising for sale in Missouri lottery tickets or devices in the nature of a lottery whether the lottery itself takes place in this state or elsewhere. The statute anticipates affirmative action in this state for the purpose of promoting a lottery. This interpretation of the legislature's intent with respect to Section 563.440 is bolstered by both the exception contained in Section 563.374, RSMo, allowing individuals to sell, store, possess or transport gambling devices, articles, etc., in interstate commerce, and the use of the term print in conjunction with the term publish in Section 563.440. Therefore, we conclude that in the context of Section 563.440 the term "print" must mean more than merely making an impression with inked type. We believe that the term "print" as used in the phrase ". . . print or publish an advertisement . . ." refers to the printing, and the dissemination of that material in this state for the purpose of advertising lottery tickets or any device in the nature of a lottery. Consequently, we do not believe that this statute would prohibit the printing of advertisements or other promotional material for a consumer sweepstakes conducted outside Missouri where the material is shipped directly in interstate commerce after it is printed, and not used in this state for any purpose.

In light of our conclusions with respect to Sections 563.374, 563.430, and 563.440, we find it unnecessary to respond to the fourth question presented in your opinion request.

CONCLUSION

It is, therefore, the opinion of this office that:

Honorable James F. Conway

(1) Section 563.374, RSMo 1969 would not prohibit the printing of advertisements or other promotional material in Missouri for use in consumer sweepstakes conducted outside this state when the printed material is shipped directly to the out-of-state locations.

(2) Section 563.430, RSMo 1969 and Section 563.440, RSMo 1969 do not apply to or prohibit the printing of advertisements or promotional material in Missouri for use in consumer sweepstakes conducted outside the state when the printed material is shipped directly to the out-of-state locations.

The foregoing opinion, which I hereby approve, was prepared by my assistant, William F. Arnet.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosure: Op. No. 5
8-14-52, Bamburg

JOHN ASHCROFT
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

(314) 751-3321

January 21, 1977

OPINION LETTER NO. 22

Mr. Wm. Kenneth Carnes, Director
Department of Public Safety
P. O. Box 749
Jefferson City, Missouri 65101

Dear Mr. Carnes:

This is in response to the request by your predecessor for an opinion of this office on the following question:

> "Whether the Adjutant General may reimburse the United States Government for the value of military property, lost damaged or destroyed, from appropriated funds (MO) available to the Adjutant General, or whether such reimbursement requires a specific appropriation by the General Assembly?"

The answer to your question necessitates, as a preliminary matter, an analysis of the legal relationship which exists between the United States Government and the Adjutant General of Missouri with respect to the military property issued to the Missouri National Guard. We assume that any military property to which you refer is property contemplated by 32 U.S.C. § 710 and National Guard Regulation 735-11, paragraph 1-11. We furthermore assume that the Adjutant General of Missouri has acknowledged receipt of all military property issued to the Missouri National Guard by the United States Government pursuant to the provisions in Title 32 of the United States Code which provides the conditions upon which the property is issued. Therefore, we assume that the Missouri National Guard, through the Adjutant General of Missouri, has received the property with the knowledge of the conditions upon which it was issued and thus is contractually bound with the United States Government

to account for that property pursuant to 32 U.S.C. § 710 and National Guard Regulation 735-11.

The law in this state has recognized the principle that when a state enters into a validly authorized contract it binds itself to the performance of that contract just as any private citizen would do by so contracting and cannot invoke any privilege of sovereign immunity. V. S. DiCarlo Construction Company, Incorporated v. State, 485 S.W.2d 52 (Mo. 1972). See also Section 490.460, RSMo 1969. We believe, therefore, that the Missouri National Guard cannot be excused from the performance of any contractual obligations it has assumed simply because it is an arm of the state government. Accordingly, unless the state of Missouri can assert a valid defense under the law of contracts, it is bound to reimburse the United States Government for the value of military property under the terms and conditions upon which the property was received and acknowledged by the Adjutant General.

Your specific question dealing with the specificity of appropriations from which funds may be spent to reimburse the United States Government for this lost, damaged, or destroyed military property requires an analysis of the specific appropriations for the fiscal year for which such payments are to be made. In this regard, it is clear that every appropriation must specify distinctly the purpose for which moneys are to expended. State ex inf. Danforth v. Merrell, 530 S.W.2d 209 (Mo.Banc 1975). The Missouri General Assembly has a duty to fix the purpose for each appropriation and moneys cannot be paid out except as for the purpose fixed. Article IV, Sections 23 and 28, Constitution of Missouri; Nacy v. Le Page, 111 S.W.2d 25, 26 (Mo. 1937); State ex rel. Cason v. Bond, 495 S.W.2d 385 (Mo.Banc 1973).

We believe that an appropriation to reimburse the United States Government for the value of military property lost, damaged, or destroyed must be specific to the extent that there is a clear legislative intent seen in the appropriation legislation which identifies the appropriated funds for the purpose of reimbursement to the United States Government for such property.

It is our view that the Adjutant General may reimburse the United States Government for the value of military property received by the state of Missouri under 32 U.S.C. § 710 and which is lost, damaged, or destroyed if there is an appropriation which provides for payment to the federal goverment for military property lost, damaged, or destroyed.

Yours very truly,

John Ashcroft

JOHN ASHCROFT
Attorney General

CONSTITUTIONAL LAW:
COMMON PLEAS CLERKS:

The office of clerk of the Cape Girardeau Court of Common Pleas will be abolished as of January 2, 1979, when Article V, Section 27, Missouri Constitution, becomes effective.

OPINION NO. 23

May 18, 1977

FILED
23

Honorable Bradshaw Smith
Prosecuting Attorney
Cape Girardeau County
P. O. Box 552
Cape Girardeau, Missouri 63701

Dear Mr. Smith:

This is in response to a request by your predecessor for an opinion from this office as follows:

> "By virtue of the adoption of the Judicial Reform Amendment on August 3, 1976 (Article V, Section 27 of the Missouri Constitution) will there be an office of the Clerk of the Common Pleas Court for Cape Girardeau County on January 2, 1979? If so, will such position be appointive or elective?
>
> "The fact giving rise to this question is that the Judicial Reform Act of 1976 (Missouri Constitution, Article V, Section 27) transfers the jurisdiction of all Courts of Common Pleas to the Circuit Court as a division of the Circuit Court. (Section 27 1.C.) Section 478.710 of the Revised Statutes of Missouri provides for a second division Circuit Judge of Bollinger and Cape Girardeau Counties. Section 480.010 provides for a Court of Common Pleas for Cape Girardeau County. Section 480.110 designates the Judge of the 32nd Judicial Circuit to be the Judge of the Cape Girardeau Court of Common Pleas. Section 483.420 of the Revised Statutes of Missouri provides that the Clerk of the Common Pleas Court shall possess the same qualifications as

> the Clerk of the Circuit Court and shall be elected every four years by the qualified voters of Cape Girardeau County. Article V, Section 27 C of the Constitution makes provision for the election of the Clerk of the Hannibal Court of Common Pleas but does not make reference to the procedure for the election of the Clerk of the Cape Girardeau Court of Common Pleas.
>
> "By January 1, 1977, the current Clerk of the Common Pleas Court, Jimmy Joe Below, will resign that position in order to be sworn in as the Sheriff of Cape Girardeau County, having been elected to that post on November 2, 1976. Mr. Below will be leaving the office and an unexpired term of two more years. The question presented is what happens to the office and what is the procedure for filling such office should it exist upon the effective date of the Judicial Reform Article on January 2, 1979."

Article V, Section 27, Missouri Constitution, as adopted by the special election on August 3, 1976, and which, except as otherwise provided in this article, becomes effective on January 2, 1979, provides in part as follows:

> "2. All magistrate courts, probate courts, courts of common pleas, the St. Louis court of criminal correction, and municipal corporation courts shall continue to exist until the effective date of this article at which time said courts shall cease to exist. . . ."

Under this constitutional provision, on the effective date of this article, courts of common pleas cease to exist.

Section 27, subdivision 2 c, provides in part as follows:

> "c. The jurisdiction of St. Louis court of criminal correction and all courts of common pleas shall be transferred to the circuit court for the respective circuit and such courts shall become divisions of the circuit court. The provisions of law relating to practice and procedure of the

> courts of common pleas shall, until otherwise changed by law, remain in effect and the provision of law relating to practice, procedure, venue, jurisdiction, selection of jurors, election of clerk and provisions for deputies and all other provisions of law relating to the Hannibal Court of Common Pleas shall until otherwise changed by law, remain in effect as to such division of the Marion county circuit court and said division shall be known as division number 2 of the Marion county circuit court instead of the Hannibal Court of Common Pleas."

Under this constitutional provision, jurisdiction of all courts of common pleas is transferred to the circuit court for the respective circuit and such courts shall become divisions of the circuit court; and the provisions of law relating to practice and procedure of the courts of common pleas shall, unless otherwise changed by law, remain in effect. The provision of law relating to practice, procedure, venue, jurisdiction, selection of jurors, election of clerk, and provisions for deputies and all other provisions of law relating to the Hannibal Court of Common Pleas shall remain in effect as to such division of the Marion County Circuit Court unless otherwise changed by law and shall be known as Division No. 2 of the Marion County Circuit Court instead of the Hannibal Court of Common Pleas.

Section 483.445, RSMo, providing for the election of a clerk of the Hannibal Court of Common Pleas is expressly retained.

Section 27, subdivision 4 b, provides as follows:

> "b. On the effective date of this article, judges of the St. Louis court of criminal correction and judges of the courts of common pleas shall become circuit judges and be entitled to the compensation of circuit judges and shall have the same power and jurisdiction as circuit judges."

Under the above-constitutional provision, judges of courts of common pleas become circuit judges and have the same power and jurisdiction as circuit judges.

Section 483.420, RSMo 1969, provides for the election of a clerk of the Cape Girardeau Court of Common Pleas for a term of

four years who shall possess the same qualifications as the clerk of the Circuit Court of Cape Girardeau County.

The question you have submitted is what happens to the office of the clerk of Cape Girardeau Court of Common Pleas when this constitutional provision, which abolishes the court of common pleas, becomes effective January 2, 1979.

Section 27, subdivision 10 a 1, provides that until otherwise provided by law, circuit clerks in each circuit and county shall be selected in the same manner as provided by law on the effective date of this article except in counties having a charter form of government in which the clerk shall be elected in the manner provided for by the charter.

Section 27, subdivision 10 a 2, provides that upon the expiration of the terms of the office of the clerk of the Circuit Court for Criminal Causes of the City of St. Louis and of the St. Louis Court of Criminal Corrections, the offices of such clerks cease to exist and thereafter the clerk of the Circuit Court of the City of St. Louis shall have and perform the powers and duties and serve all divisions of the circuit court.

Section 27, subdivision 10 a 3, provides that there shall continue to be an office of circuit clerk in each county of the circuit until otherwise changed by law. There is no provision or mention made of the clerk of the Cape Girardeau Court of Common Pleas, although all other court clerks are expressly retained or abolished, so the question is whether that office is abolished on the effective date of this constitutional amendment which is January 2, 1979. When the Cape Girardeau Court of Common Pleas is abolished, the clerk of the common pleas court will have no statutory duties to perform.

We have been unable to find any court decisions that are in point on this question.

City of St. Louis v. Whitley, 283 S.W.2d 490 (Mo. 1955), was a suit to recover public funds that had been paid public employees for services they did not render and did not intend to render when they were employed. In discussing this matter, the court stated, l.c. 493:

> "Public officials are entitled to the compensation incident to the offices to which they are elected or appointed; and it may be that they are entitled to the emoluments of the offices even though they

> perform no services. 4 McQuillin, Municipal Corporations, Sec. 12.200; Bartholomew v. Town of Springdale, 91 Wash. 408, 157 P. 1090, Ann.Cas.1918B, p. 435; 62 C.J.S., Municipal Corporations, §§ 523, 526, pp. 974, 977. But this rule and the public policy upon which it is based does not affect and is not to be confused with the equally and obviously well-established principle that public funds are trust funds, Lamar Township v. City of Lemar [sic], supra, and public officers entrusted with their expenditure are trustees of all such funds. State v. Weatherby, 344 Mo. 848, 129 S.W.2d 887, 891; State v. Young, 134 Iowa 505, 110 N.W. 292, 13 Ann.Cas. 351. A fortiori, it is indeed a plainer fundamental, which the office is a sham and no services have been performed, that the payment or acceptance of payment from such trust funds is 'an unfaithful discharge of duty'. Maryland Casualty Co. v. Kansas City, 8 Cir., 128 F.2d 998, 1003; 4 McQuillin, Municipal Corporations, Sec. 12.217. . . ."

In State ex rel. Sanders v. Cervantes, 480 S.W.2d 888 (Mo. Banc 1972), the court held:

> ". . . that a provision for insurance benefits to dependents of police officers and life insurance for retired officers and employees violated Article VI, Section 25, supra, because those persons were not to perform any services in exchange for newly projected benefits. . . ." (State ex rel. Dreer v. Public School Retirement System of City of St. Louis, 519 S.W.2d 290, 298 (Mo. 1975))

Applying the principle of the law, as enunciated in the above cases, that, although the statute which provides for an office of clerk of the Cape Girardeau Court of Common Pleas is not expressly abolished, due to the fact that the court of common pleas will be abolished when the constitutional amendment becomes effective and due to that fact the clerk of the court of common pleas will have no statutory duties to perform, it is our view that the office of the clerk of the Cape Girardeau Court of Common Pleas will be abolished and cease to exist on January 2, 1979, when the constitutional provision becomes effective. It is our view that all the jurisdiction

and authority of the Cape Girardeau Court of Common Pleas will be transferred to the circuit court of that county on the effective date of this article and all the duties of the clerk of the Cape Girardeau Court of Common Pleas are to be performed by the clerk of the circuit court of Cape Girardeau County. It is our view that when all the duties of a public official cease to exist the office is abolished.

In State ex rel. Vossbrink v. Carpenter, 388 S.W.2d 823 (Mo.Banc 1965), the court held that the county superintendent of the schools who had been granted a salary for his services of supervisor of school transportation was entitled to such salary even though there were no busses which he was authorized to inspect in his county. The holding in this case is to be distinguished from the holding made herein due to the fact that the county superintendent had duties to perform other than supervising school transportation.

CONCLUSION

It is the opinion of this office that the office of clerk of the Cape Girardeau Court of Common Pleas will be abolished as of January 2, 1979, when Article V, Section 27, Missouri Constitution, becomes effective.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

John Ashcroft

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

September 27, 1977

OPINION LETTER NO. 25

Mr. James F. Walsh, Director
Department of Social Services
Broadway State Office Building
Jefferson City, Missouri 65101

Dear Mr. Walsh:

Your predecessor requested our opinion on the question whether a state-owned vehicle operated by officers or employees of the Division of Corrections to apprehend escapees or to transmit sick or injured inmates to hospitals can be considered an emergency vehicle so as to permit the use of red lights or sirens thereon.

Section 304.022.3(1), RSMo Supp. 1975, sets forth the rules of the road for "emergency vehicles", and therein defines the term. The definition includes the following:

> "A vehicle operated as an ambulance, or a vehicle operated by the state highway patrol, police or fire department, sheriff, constable or deputy sheriff, traffic officer, or coroner;"

The driver of an emergency vehicle ". . . shall not sound the siren thereon or have the front red lights . . . on except when said vehicle is responding to an emergency call . . ." §304.022.4(1), RSMo Supp. 1975.

Webster's New International Dictionary includes in its definition of the word ambulance: "A vehicle equipped for transporting those who are wounded, injured, or sick."

Mr. James F. Walsh

A definition of the word ambulance as found in Section 190.100(1), RSMo Supp. 1975, reads in part as follows:

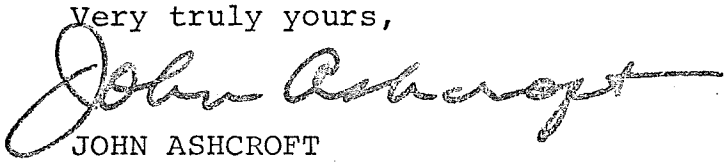
> "[A]ny privately or publicly owned motor vehicle that is specially designed or constructed and equipped and is intended to be used for and is maintained or operated for the transportation of patients, . . ."

However, such definition is not applicable to motor vehicles owned by the state of Missouri. See Section 190.100(10), RSMo Supp. 1975.

We find no statutory basis for determining that a state-owned vehicle operated by the Division of Corrections' personnel to pursue or capture escapees is an emergency vehicle for purposes of using a red light or siren on the public highways.

We believe that a state-owned vehicle that is operated by personnel of the Division of Corrections to transport sick or injured inmates to hospitals could be considered to be "operated as an ambulance" and consequently when "responding to an emergency call" on the public streets and highways the operator may activate a siren and red light.

Very truly yours,



JOHN ASHCROFT
Attorney General

DRAINAGE DISTRICTS:
TAXATION:

The board of supervisors of a drainage district organized in the circuit court under provisions of Chapter 242, RSMo, may levy a tax for organizational purposes at different times provided that the total taxes levied for this purpose do not exceed the sum of one dollar per acre for each acre of land within the district.

OPINION NO. 27

February 25, 1977

FILED
27

Honorable Fred DeField
Missouri House of Representatives
Room 401, State Capitol
Jefferson City, Missouri 65101

Dear Mr. DeField:

This is in response to your request for an opinion from this office as follows:

> "May the Board of Supervisors of a Circuit Court Drainage District levy a Twenty Cents (.20) per acre Organizational Tax, authorized under the provisions of Section 242.430 RSMo. 1969, in five (5) successive tax years, so as to obtain for the District the full Organizational Tax of One Dollar ($1.00) per acre upon each and every acre of land within the boundaries of Consolidated Drainage District No. 1 of Mississippi County, Missouri, as authorized by the said Section 242.430 RSMo. 1969, as amended?"

A drainage district organized in circuit court is governed by the provisions of Chapter 242, RSMo. Section 242.430 (1), RSMo, provides as follows:

> "The board of supervisors of any drainage district organized under the provisions of sections 242.010 to 242.690 shall as soon as elected and qualified, levy a uniform tax of not more than one dollar per acre upon each acre of land within such district, as defined by the articles of association to be used for the purpose of paying expenses incurred or to

> be incurred in organizing said district, making surveys of the same and assessing benefits and damages and to pay other expenses necessary to be incurred before said board shall be empowered by section 242.450 to provide funds to pay the total cost of works and improvements of the district."

This statute is similar to the provisions of Section 245.175, RSMo, which applies to the organization of levee districts. This section provides that the board of supervisors shall levy a uniform tax of not more than one dollar per acre upon each acre of land within such district to be used for the purposes of paying expenses incurred or to be incurred in organizing such district. In Opinion No. 174, issued May 15, 1964, to Crigler, copy enclosed, it was our opinion that the board of supervisors of a levee district had authority under Section 245.175, RSMo, to levy a tax required for organizational purposes when needed provided the total taxes levied did not exceed the maximum amount permitted by the statute. It is our opinion that the principles of law as set forth in that opinion would be applied to an interpretation of the provisions of Section 242.430.

CONCLUSION

It is the opinion of this office that the board of supervisors of a drainage district organized in the circuit court under provisions of Chapter 242, RSMo, may levy a tax for organizational purposes at different times provided that the total taxes levied for this purpose do not exceed the sum of one dollar per acre for each acre of land within the district.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Enclosure: Op. No. 174
5-15-64, Crigler

ROADS AND BRIDGES:
DRAINAGE DISTRICTS: The word "bridge," as used in Section 242.350, RSMo, includes "culvert"; and drainage districts organized under the provisions of Chapter 242, RSMo, may utilize culverts rather than bridges where the drainage ditches of the district cross public roads.

OPINION NO. 28

FILED
28

April 28, 1977

Honorable Fred DeField
Representative, District 160
Room 401, State Capitol Building
Jefferson City, Missouri 65101

Dear Representative DeField:

This is in response to your request for an opinion from this office asking whether it is proper in construing Section 242.350, RSMo 1969, to substitute the word "culvert" for the word "bridge," and the word "culverts" for the word "bridges."

As we understand, the drainage district in question was incorporated by action of the Circuit Court of Mississippi County, Missouri, on February 12, 1976, but the final plan of reclamation has not been adopted by the board of supervisors; and you inquire whether it is proper in the design of a plan of reclamation for the circuit court drainage district or an engineer to utilize culverts rather than bridges where the drains of the district intersect public roads.

Drainage districts are created by statute, and the powers and authority of drainage districts in this state organized in circuit court are governed by Chapter 242, RSMo. Section 242.220 provides that within sixty days after organizing the board of supervisors shall appoint a competent civil engineer who shall make all necessary surveys and make a report in writing to the board of supervisors containing a plan for draining, leveling, and reclaiming the lands and property described in the articles of the association or adjacent thereto and maps and profiles which indicate physical characteristics of the land and location of public roads, bridges, other rights-of-way, roadways, and other property or improvements located on such lands.

Section 242.230 provides that the chief engineer shall make a report in writing to the board of supervisors concerning the surveys and plans for reclaiming the land and other property contained in the district organized by the court which plan after

adoption shall be known and designated as "the plan for reclamation." Other statutory provisions provide that the plan of reclamation shall be filed with the circuit court and for commissioners to be appointed to assess the benefit and damages which may result under the plan of reclamation and, if the costs of the works and improvements as provided for in the plan of reclamation exceed the benefits, the court is to declare the corporation dissolved or, if the estimated costs of constructing the improvements contemplated in the plan of reclamation is less than the benefits assessed against the land and other property in the district, the court shall approve and confirm the commissioners' report. Other statutes provide for the amendment of the plan of reclamation which also has to be approved by the circuit court before it becomes effective.

In order to determine what is to be included in the plan of reclamation, we must look to the statutes to determine the powers and authorities and duties given.

Section 242.350 provides as follows:

> "1. All bridges contemplated by sections 242.010 to 242.690 and all enlargements of bridges already in existence shall be built and enlarged according to and in compliance with the plans, specifications and orders made or approved by the chief engineer of the district.
>
> "2. If any such bridge shall belong to any corporation, or be needed over a public highway or right-of-way of any corporation, the secretary of said board of supervisors shall give such corporation notice by delivering to its agent or officer, in any county wherein said district is situate, the order of the board of supervisors of said district declaring the necessity for the construction or enlargement of said bridge. A failure to construct or enlarge such bridge within the time specified in such order shall be taken as a refusal to do said work by said corporation, and thereupon the said board of supervisors shall proceed to let the work of constructing or enlarging the same at the expense of the corporation for the cost thereof, which costs shall be collected by said board of supervisors from said corporation, by suit therefor, if necessary. But before said

board of supervisors shall let such work, it shall give some agent or officer of said corporation, now authorized by the laws of this state to accept service of summons for said corporation, at least twenty days' actual notice of the time and place of letting such work.

"3. Any owner of land within or without the district may, at his own expense, and in compliance with the terms and provisions of sections 242.010 to 242.690, construct a bridge across any drain, ditch, canal or excavation in or out of said district.

"4. All drainage districts shall have full authority to construct and maintain any ditch or lateral provided in its plan for reclamation, across any of the public highways of this state, without proceedings for the condemnation of the same, or being liable for damages therefor. Within ten days after a dredge boat or any other excavating machine shall have completed a ditch across any public highway, a bridge adjudged sufficient by the county court of said county or counties shall be constructed over such drainage ditch where the same crosses such highway, and after such bridge has been constructed it shall become a part of the road over which it is constructed and shall be maintained by the authority authorized by law to maintain the road of which it becomes a part.

"5. When any drainage district has heretofore constructed or shall hereafter construct a bridge over a drainage ditch where the same crosses any public highway, said drainage district shall not be under obligation thereafter to further maintain or reconstruct any such bridge or bridges for more than twenty years after it first constructed or constructs such bridge at said place. If said bridge has been constructed by the drainage district and has become a part of said road and is then destroyed the authorities having control of the road are authorized, if they desire, to reconstruct

> such bridge, provided, however, the word corporation as used in this section shall not apply to the state or any political or civil subdivision thereof." (Emphasis supplied)

You inquire whether the term "bridge," as used in Chapter 242, RSMo, would include culverts.

Although there have been many public court cases in this state involving drainage districts, we have been unable to find any case involving the question we are now considering.

Section 242.699 provides as follows:

> "The provisions herein contained are declared to be remedial in character, shall be liberally construed by the courts promptly and shall apply to districts already organized, in process of reorganization or to be hereafter organized or reorganized by circuit courts of this state."

In Graves v. Little Tarkio Drainage Dist. No. 1, 134 S.W.2d 70 (Mo. 1939), the court stated that all the terms and provisions of the drainage act should be construed broadly and liberally to effectuate the wholesome and beneficial motives which prompted its enactment; that the statutes are remedial in character and purpose and shall be liberally construed by the courts in carrying out this legislative intent and purpose.

In Central Bridge & Construction Co. v. Saunders County, 184 N.W. 220 (Nebr. 1921), the issue before the court concerned the use of public funds appropriated for building bridges or building culverts in a suit brought by a taxpayer to prohibit the county commissioners from using the funds in payment to the contractor for building culverts. In discussing this question, the court stated, l.c. 223:

> "It would seem, therefore, that, regardless of the question of the validity of the orders for bridge and culvert construction, the Legislature has declared the bridge orders, at least, valid claims against the county. But appellant contends that the validating act does not cover claims for culvert construction; the language being, 'contract for bridge construction or repair.' This brings us to the second question presented, the determination of which

involves the construction of the validating act in connection, of course, with the other provisions of the statute of which, as an amendment, it forms a part. In view of our holding that the commissioners were authorized to anticipate the levy for the year 1918 in issuing the orders in question, and that such orders were valid, it will not be necessary to decide this question. In the opinion of the writer, however, the validating act is broad enough to cover both bridge and culvert construction for the reasons: (1) A culvert is easily within Webster's definition of a bridge:

'A structure erected over a depression or an obstacle, as over a river, chasm, roadway, railroad, etc., carrying a roadway for passengers, vehicles,' etc.

"Of course, a culvert, strictly speaking, is a conduit for passage of water, or a way, but with respect to its use in a highway may be, and generally is, a structure carrying a roadway--it bridges a chasm in the road. If the structure over a ditch consists of longitudinal stringers with planks across, it is a bridge. Is it any less a bridge, in a general sense, if it consisted of a box of four sides, laid transversely to the road? The primary object in each case is to carry the road over the ditch. (2) The other sections of the statute of which it forms a part deal with both kinds of improvements, both of which are to be paid for from the same fund, and the statute does not pretend to determine how much of such fund shall be devoted to the construction of bridges and how much to culverts, and the amount limited for bridges alone is therefore not determinable; (3) and while the validating act uses the term 'bridges' only, it is dealing with the total fund, and the evident intent of the Legislature was to validate all contracts which might lawfully be paid out of such fund but for the fact that they were excessive. Appellant cites a number of

> cases involving construction of statutes, to the effect that a culvert is not a bridge, but they were all cases involving the liability of municipal corporations for damages by reason of defective bridges, calling for a strict construction of the statutes declaring liability; the statute in question is remedial and should receive a liberal construction." (Emphasis supplied)

It is our opinion that the statutory provisions in Chapter 242 providing for the organization of drainage districts organized in the circuit court and their powers and authorities given by statute should be liberally construed to effectuate the purpose for which they were enacted; and although ordinarily the word "bridge" is not synonymous with the word "culvert," we believe that it was the intent of the legislature in this statute to consider the word "bridge" in its broadest terms to include culverts. We think it is common knowledge that at the present time in modern methods of construction of highways frequently culverts are used instead of bridges. Under the same physical facts, years ago in many instances bridges would have been used. However, at the present time, culverts are frequently utilized because of the fact that in many situations culverts are not as expensive to build as bridges would be.

CONCLUSION

It is our opinion that the word "bridge," as used in Section 242.350, RSMo, includes "culvert" and that drainage districts organized under the provisions of Chapter 242, RSMo, may utilize culverts rather than bridges where the drainage ditches of the district cross public roads.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

John Ashcroft

JOHN ASHCROFT
Attorney General

MAGISTRATES: The civil jurisdiction of the magistrate courts, including the magistrate courts in the City of St. Louis, is provided for in Section 482.090 as amended by C.C.S.H.B. Nos. 1317 and 1098, 78th General Assembly, Second Regular Session, in the maximum amount of $5,000.

OPINION NO. 29

April 11, 1977

FILED
29

Honorable Kenneth J. Rothman
Representative, District 77
Room 309, State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Rothman:

This is in response to your request for an opinion from this office in which you inquire whether the St. Louis magistrate court civil jurisdiction is limited to actions in the amount of $3,500 or less, exclusive of interest and costs.

Your question is occasioned because S.C.S.S.B. No. 658, 78th General Assembly, Second Regular Session, provides for a maximum jurisdictional amount of $3,500 for the magistrate courts of St. Louis City and C.C.S.H.B. Nos. 1317 and 1098, 78th General Assembly, Second Regular Session, deleted the $3,500 maximum jurisdictional amount.

For the sake of clarity, S.C.S.S.B. No. 658 will be referred to as V.A.M.S. Act 70 and C.C.S.H.B. No. 1317 and 1098 will be referred to as V.A.M.S. Act 72, both being so described in Vernon's Missouri Legislative Service, 1976.

Acts 70 and 72 were both approved by the Governor on the same day, June 17, 1976, and both became effective ninety days after adjournment.

The title to Act 70 related to the St. Louis court of criminal correction and the magistrates courts in the City of St. Louis and the jurisdiction and the duties of the judges and the personnel of said courts. The title to Act 72 related to magistrate and probate courts and judges thereof.

Act 70 amended Section 482.230, RSMo 1969, to read as follows:

> "1. Each such magistrate court and each of its divisions and magistrates shall have coextensive

amendments to Section 482.230. As found in Section 482.230, V.A.M.S. Pocket Part Supplement, the consolidated section provides as follows:

> "1. Each such magistrate court and each of its divisions and magistrates shall have coextensive with the city all the duties, powers and jurisdiction given by general law to magistrates and magistrate courts in criminal and civil cases and matters, and all the provisions of general law applicable to magistrates, their courts and officers, shall be applicable to the courts, magistrates and officers subject to the provisions of sections 482.220 to 482.280, except so far as inconsistent therewith.
>
> "2. Each such magistrate shall also have all the duties, powers and jurisdiction as vested by general law in magistrates and magistrate courts in all criminal cases, examinations, hearings, proceedings and matters.
>
> "3. The practice, procedure and costs relating to the prosecution of criminal offenses before such magistrates shall be as provided by general law relating to magistrates and magistrate courts in criminal cases."

Thus, the Revisor has followed the proper procedure by taking all the language which was amendatory and consolidating it with the appropriate explanatory note as authorized by Section 3.065. This procedure conforms with the rule of construction that the legislature intends something by the amendment of a statute. St. Charles Building & Loan Ass'n. v. Webb, 229 S.W.2d 577 (Mo. 1950).

Thus, since Act 70 made no amendment to the amount in controversy with respect to the City of St. Louis magistrate courts and since Act 72 eliminated the jurisdictional amounts in its amendment of Section 482.230 and inserted a general jurisdictional amount for all magistrate courts under Section 482.090, a reading of these statutes together leads us to the conclusion that the jurisdictional amount of all magistrate courts, including the magistrate courts in the City of St. Louis, is $5,000 as of August 13, 1976.

In direct answer to your question, the St. Louis magistrate court jurisdiction is not limited to $3,500 as provided in Act 70 as it was clearly the legislative intent as provided in Act 72 to remove such jurisdictional limitation and to allow the St.

Louis magistrate court to come within the $5,000 jurisdictional maximum as provided in Section 482.090 as amended.

CONCLUSION

It is the opinion of this office that the civil jurisdiction of the magistrate courts, including the magistrate courts in the City of St. Louis, is provided for in Section 482.090 as amended by C.C.S.H.B. Nos. 1317 and 1098, 78th General Assembly, Second Regular Session, in the maximum amount of $5,000.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,

John Ashcroft

JOHN ASHCROFT
Attorney General

JOHN ASHCROFT
ATTORNEY GENERAL

OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

(314) 751-3321

January 13, 1977

OPINION LETTER NO. 30

Honorable C. E. Hamilton, Jr.
Prosecuting Attorney
Callaway County Courthouse
Fulton, Missouri 65251

Dear Mr. Hamilton:

This is in response to your request for an opinion from this office as follows:

> "Is it lawful for a taxpayer to pay his taxes for years beyond the current year and is it lawful for the county to accept such prepaid taxes? Secondly, if the answer to this question is yes, is it lawful for the county to give credit to the company for interest on the amount and for the term that the taxes have been prepaid?
>
> "Union Electric is building a new nuclear plant in Callaway County. Consequently, in future years Callaway County will be taking in a great amount of taxation from Union Electric on its properties. However, this taxation is not due as of the present time and Callaway County needs additional funds with which to plan and undertake projects which will be needed prior to the time Union Electric's taxes are due. Union Electric has expressed some interest in prepaying taxes for the next two or three years to Callaway County at this time, as long as it can accept credit for those taxes in future years."

Callaway County is a third class county not under township organization.

You first inquire whether it is lawful for a taxpayer to pay his property taxes for years beyond the current year and for the county to accept such prepaid taxes.

Article VI, Section 7, Constitution of Missouri, provides that the county court shall manage all county business as prescribed by law and keep an accurate record of its proceedings. We are unable to find any statute of this state authorizing the county court to accept any money in payment of property taxes.

Section 52.010, RSMo, provides that at the general election a collector, to be styled the collector of revenue, shall be elected in each of the counties of this state, except counties under township organization, who shall hold their office for four years and until a successor is duly elected and qualified.

Payment and collection of current taxes is governed primarily by Chapters 137 and 139, RSMo.

Section 137.290, RSMo, provides that the clerk of the county court, upon receipt of the certificates of the rates levied by the county court, school district, and other political subdivisions authorized by law to make levies, shall extend the taxes in the assessor's book according to the rates levied. The clerk shall, on or before the thirty-first day of October of each year, deliver the tax book with the rates extended therein to the collector, who shall give receipt therefor to the clerk.

Section 139.010, RSMo, provides that it shall be the duty of the collectors of revenue of the several counties of the state, immediately after the receipt of the tax books of their respective counties, to give not less than twenty days' notice of the time and place at which they shall meet the taxpayers of their respective counties, and collect and receive their taxes; provided, however, the county court may relieve the collector from visiting any municipal township in his county by an order of record to be made before notice under the provisions of this section is given.

In State ex rel. and to use of Parish v. Young, 38 S.W.2d 1021 (Mo. 1931), the court discussed among other things the authority and powers of the county collector in collecting taxes. The court stated, l.c. 1023, as follows:

> ". . . The power to levy and collect taxes is purely statutory, and has been confided

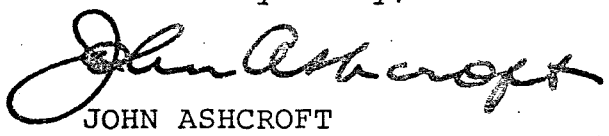
> to the Legislature and not the courts. De Arman v. Williams, 93 Mo. 158, 163, 5 S. W. 904; State ex rel. v. Ry. Co., 87 Mo. 236; City of Carondelet v. Picot, 38 Mo. 125, 130; 25 R. C. L. pages 27 to 29. Collection of taxes can only be made in accordance with the tax books as actually made and furnished to the collector. State ex rel. v. Brown, 172 Mo. 374, 380, 72 S. W. 640." (Emphasis supplied)

We find no statute authorizing the county collector to receive any money in payment of taxes except as provided for in the tax books as delivered to him by the county clerk. Section 558.150, RSMo, provides as follows:

> "Every collector of the revenue who shall unlawfully collect taxes when none are due, or shall willfully and unlawfully exact or demand more than is due, shall, upon conviction, be adjudged guilty of a misdemeanor."

The question of the collection of delinquent taxes is provided for in other statutory provisions which are not material to the question under consideration. It is the view of this office that the county collector has no authority to accept money in payment of taxes in excess of the amount shown on the tax books delivered to him by the county clerk and, therefore, he has no authority to accept payment of taxes or estimated taxes for future years.

Yours very truly,



JOHN ASHCROFT
Attorney General

COOPERATIVE AGREEMENTS:
DEPARTMENT OF PUBLIC SAFETY:
LAW ENFORCEMENT ADMINISTRATION:

The Department of Public Safety, Missouri Council on Criminal Justice, although it does not have the authority to determine the number of and the geographical boundaries of regional criminal justice planning units which have been established by cooperative agreement by and between political subdivisions of the State of Missouri pursuant to the provisions of Section 70.220, RSMo 1969, can choose not to recognize the regional planning units as they presently exist, and is not required by state law to make federal money available to those presently existing regional criminal justice planning units for law enforcement planning purposes.

OPINION NO. 33

February 25, 1977

FILED
33

Mr. Wm. Kenneth Carnes, Director
Department of Public Safety
621 East Capitol Avenue
Jefferson City, Missouri 65101

Dear Mr. Carnes:

This official opinion is issued in response to a request by your predecessor for a ruling on the following questions:

> "1. Does the Department of Public Safety, Missouri Council on Criminal Justice, have the authority to determine the number of and the geographical boundaries of regional criminal justice planning units, established by political subdivisions of the state pursuant to the provisions of Sections 70.220 and 70.230, RSMo 1969, or Chapter 251, RSMo 1969, and recognized by the Missouri Council on Criminal Justice, for the purpose of implementing the provisions of the Crime Control Act of 1973, Public Law 93-83?
>
> "2. If the answer to the first question is in the negative, does the Department of Public Safety, Missouri Council on Criminal Justice, have the authority to determine whether to recognize regional criminal justice planning units for the purpose of implementing the Crime Control Act of 1973, Public Law 93-83?"

The opinion request indicated that the Law Enforcement Assistance Administration had been presented with similar legal inquiries with respect to the application of federal law and regulations. Therefore, this opinion shall be confined to applicable state law except insofar as pertinent federal statutory citations may be necessary to clarify the position taken by this office.

Before responding directly to the legal issues presented by the opinion request, we believe that background information concerning the creation and existence of the Missouri Council on Criminal Justice and of regional criminal justice planning units is essential to an understanding of those issues. We were assisted in the compilation of this background information by Mr. Jay Sondhi, Executive Director of the Missouri Council on Criminal Justice.

The Omnibus Crime Control and Safe Streets Act of 1968 was passed by Congress and signed into law by President Johnson in 1968. Subsequently, the Act was reauthorized and amended in 1971 and 1973. The purpose of this Act and its successors, is set forth in the Crime Control Act of 1973, Public Law 93-83, Title 42, U.S.C., Section 3701.

> "It is therefore the declared policy of the Congress to assist State and local governments in strengthening and improving law enforcement and criminal justice at every level by national assistance. It is the purpose of this chapter to (1) encourage States and units of general local government to develop and adopt comprehensive plans based upon their evaluation of State and local problems of law enforcement and criminal justice; (2) authorize grants to States and units of local government in order to improve and strengthen law enforcement and criminal justice; and (3) encourage research and development directed toward the improvement of law enforcement and criminal justice and the development of new methods for the prevention and reduction of crime and the detection, apprehension, and rehabilitation of criminals."

Pursuant to the provisions contained in the original federal Act, Governor Warren Hearnes created in 1968 the Missouri

Law Enforcement Assistance Council by Executive Order and charged it with carrying out the provisions of the Act. Thereafter, units of local government, i.e., cities and counties, via cooperative agreements, formed regional law enforcement assistance councils within the state pursuant to Section 70.220, RSMo 1969. The number of such planning units created by cooperative agreement has grown from six in 1971 to nineteen at the present. The regional boundaries of these planning units, by agreement between various units of local government, conform to the geographical boundaries of regional planning commissions, already in existence at the time the Omnibus Crime Control Safe Streets Act of 1968 was passed into law, created pursuant to the provisions of Chapter 251, RSMo 1969.

In 1974, pursuant to the provisions of Section 11 (8) of the Omnibus State Reorganization Act, the Missouri Law Enforcement Assistance Council was abolished and its powers, duties, and functions were transferred to the Director of the newly created Department of Public Safety by a Type I transfer. Thereafter, within that department pursuant to the director's authority under the Omnibus State Reorganization Act to appoint such advisory boards as are required by federal laws or regulations there was created the Missouri Council on Criminal Justice. By means of an Executive Order signed on June 28, 1974, Governor Christopher S. Bond designated the new council as the state planning agency required under Section 203 (a) of Public Law 93-83, Title 42, U.S.C., Section 3723 (a).

Both the Missouri Law Enforcement Assistance Council and the Missouri Council on Criminal Justice have, heretofore, funneled planning grants provided by the federal Law Enforcement Assistance Administration, for the purposes delineated by federal law, to each of the regional planning units created by cooperative agreement to assist in the funding of planning and administration of crime control and criminal justice programs on the local level.

In specific response to the questions presented by the opinion request, we note that Section 70.220, RSMo 1969, under which the present regional planning units have been created via cooperative agreement, provides as follows:

> "Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency

> of the United States, or of this state, or with other states or their municipalities or political subdivisions, or with any private person, firm, association or corporation, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. If such contract or cooperative action shall be entered into between a municipality or political subdivision and an elective or appointive official of another municipality or political subdivision, said contract or cooperative action must be approved by the governing body of the unit of government in which such elective or appointive official resides."

The above-cited statute gives absolute authority to any political subdivision of this state to enter into a cooperative agreement or contract with any other political subdivision of the state "for a common purpose" with the proviso that the purposes of any such cooperative action or contract "shall be within the scope of the powers of such municipality or political subdivision." The proposition is axiomatic and requires no legal citations that cities and counties of the State of Missouri have included within their powers the function to serve their constituents in matters of crime control.

Furthermore, statutory authority exists whereby political subdivisions may choose, as they have done, to utilize existing regional planning commissions, already created by cooperative agreement pursuant to Section 70.220, as a vehicle whereby they may plan for law enforcement purposes. Section 251.320, RSMo 1969, provides that the comprehensive plan to be prepared by said regional planning commissions:

> ". . . shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the region which will, in accordance with existing and future needs, best promote public health, safety, morals, order,

> convenience, prosperity or the general welfare, as well as efficiency and economy in the process of development."

We have found no authority whatsoever which would allow the State of Missouri, the Department of Public Safety, or the Missouri Council on Criminal Justice to interfere with cooperative agreements made by and between units of local government within the State of Missouri, either to determine their number or their geographical boundaries, in such case as by a cooperative agreement it has been agreed as between political subdivisions to plan for local problems of law enforcement and criminal justice.

On the other hand, there is no legal responsibility on the State of Missouri or any of its agencies to recognize these regional units created by cooperative agreement nor to extend to them state or federal funds to pay for the administration of their planning projects.

This office has been able to review many of the cooperative agreements whereby regional planning units, which presently participate with the Missouri Council on Criminal Justice in law enforcement planning purposes, have been created by cooperative agreement by and between political subdivisions. In none of these agreements has the State of Missouri, the Department of Public Safety, the now defunct Missouri Law Enforcement Assistance Council, or the Missouri Council on Criminal Justice been a party. Therefore, there is no contractual obligation that the Missouri Council on Criminal Justice fund the administration and planning activities of presently constituted regional planning units merely because units of local government have agreed that said planning units should exist. Therefore, we have concluded that although the presently existing regional planning units have full authority to contract or agree with the federal government to receive directly grants for law enforcement planning purposes, the Department of Public Safety and the Missouri Council on Criminal Justice need not recognize their existence, as presently constituted, when the state discharges its obligations under federal law and regulations.

Although legal counsel for the federal Law Enforcement Assistance Administration have been asked to provide an opinion on the applicability of federal law, we find it pertinent to this opinion to note that Section 203 (c) of Public Law 93-83, Title 42, U.S.C., Section 3723 (c), provides in part that:

> "The State planning agency shall make such arrangements as such agency deems necessary

> to provide that at least 40 per centum of all Federal funds granted to such agency under this subchapter for any fiscal year will be available to units of general local government or combinations of such units to enable such units and combinations of such units to participate in the formulation of the comprehensive State plan required under this subchapter. . . ."

Governor Bond's Executive Order of June 28, 1974, designating the Missouri Council on Criminal Justice as the state planning agency required by federal law, provided that this agency "have the power to approve and disapprove the allocation of all grants received through the said Act." Likewise, the By-Laws of the Missouri Council on Criminal Justice provide in Article VII, Section (A) that:

> ". . . The Missouri Council on Criminal Justice, in order to facilitate local participation in comprehensive planning for carrying out the intent of the Act, may approve the use of regional councils established by appropriate local authorities. The number and geographical areas of such regions shall be established by action of the Council."

We interpret the above-cited authorities as indicating that, although neither the Department of Public Safety nor the Missouri Council on Criminal Justice may interfere with, determine the number of, or set the geographical boundaries of regional criminal justice planning units presently existing pursuant to cooperative agreement under Section 70.220, RSMo 1969, those state agencies have full authority to determine how they will distribute federal grants for law enforcement planning purposes to units of local government including the authority to dictate whether regional planning units presently existing shall receive law enforcement planning grants and, conversely, to determine whether changes in the number of or regional boundaries of said planning units will be required before planning grants shall be made to them.

CONCLUSION

Therefore, it is the opinion of this office that the Department of Public Safety, Missouri Council on Criminal Justice,

although it does not have the authority to determine the number of and the geographical boundaries of regional criminal justice planning units which have been established by cooperative agreement by and between political subdivisions of the State of Missouri pursuant to the provisions of Section 70.220, RSMo 1969, can choose not to recognize the regional planning units as they presently exist, and is not required by state law to make federal money available to those presently existing regional criminal justice planning units for law enforcement planning purposes.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Michael L. Boicourt.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

JOHN ASHCROFT
ATTORNEY GENERAL

Attorney General of Missouri

JEFFERSON CITY
65101

(314) 751-3321

March 30, 1977

OPINION LETTER NO. 34

Edwin M. Bode
Executive Secretary
Missouri State Employees'
Retirement System
900 Leslie Boulevard
Jefferson City, Missouri 65101

Dear Mr. Bode:

This letter is in response to your question asking whether a member of the legislature who retired January 1, 1973, after serving in seven biennial assemblies, and who was reelected again in 1974 to the legislature and thereafter served through the years 1975 and 1976, is entitled under Senate Bill 513 of the 78th General Assembly, Second Regular Session, to a refund of contributions for both of the periods for which he served.

It is clear that when the legislator retired in 1973 he had made contributions pursuant to the provisions of Section 104.365 of the Laws of 1972, now repealed by Senate Bill 513, amounting to five percent of his compensation and contributions pursuant to provisions of Section 104.360 at four percent of his compensation prior to the repeal of such section by Senate Bill 548, 76th General Assembly. There was no provision at the time of his retirement for the refund of such contributions. By comparison certain member employees were entitled to refunds of accumulated contributions and credited interest when they retired under Section 104.372 of the Laws of 1972. However, that section expressly excluded refunds to members of the system who elected to receive retirement benefits because of service in the General Assembly.

Edwin M. Bode

Senate Bill 513 is now set out in the 1976 Supplement of the Missouri Revised Statutes. Section 104.365, as amended, eliminates the payroll deduction for members of the General Assembly and provides in subsection 2 thereof:

> "Any member of the general assembly or any official holding an elective state office who is in office on September 1, 1976, who thereafter retires, shall be paid by the board an amount equal to the total amount of retirement contributions made by him together with interest at the same rate paid by the board on contributions of state employees, and when a member of the general assembly in office or an official holding an elective state office dies on or after September 1, 1976, but prior to retirement, the board shall pay such amount to such beneficiary as the deceased member shall have designated in writing or to his or her estate if no beneficiary be designated, all such payments shall be made from funds appropriated from general revenue for that purpose."

Section 104.380 as it appears in RSMo 1976 is taken from House Bills 1213 and 1733 of the Second Regular Session, 78th General Assembly effective August 13, 1976. House Bill 1733 amended subsection 2 of Section 104.380 to provide as follows:

> "If a retired member is elected to any state office or is appointed to any state office or is reemployed by a department he shall not receive an annuity for any month or part of a month for which he serves as an officer or employee, but he shall be considered to be a new employee with no previous creditable service and must accrue sufficient creditable service of two or more years after reemployment in order to receive any additional amount of annuity. Any reemployed retired member who has two or more years of creditable service and reaches his new normal retirement date shall receive an additional amount of monthly annuity calculated to include only the creditable service and the average compensation earned since his reemployment. In

> either event, the original annuity and the additional annuity, if any, shall be paid commencing with the end of the first month after the month during which his term of office has been completed, or his employment terminated."

Therefore, after the legislator was reelected he was considered a new employee with no creditable service and was required to accrue sufficient creditable service of two or more years in order to receive any additional annuity.

It is our view that at the time the legislator elected to retire in 1973 under the then applicable statutory provisions, he was not entitled to a refund of contributions and that amended Section 104.365 did not make him eligible for such a refund. In reaching this conclusion we have considered what we believe to be the legislative intent in amending Section 104.365 which intent is reflected by our reading of these provisions in their entirety.

We conclude in answer to your question that the legislator is not entitled to a refund of contributions made prior to his first retirement.

Very truly yours,

JOHN ASHCROFT
Attorney General

COMPENSATION:
PROSECUTING ATTORNEY: Section 56.280, RSMo Supp. 1975, relating to the compensation of prosecuting attorneys in counties of the third and fourth classes, does not repeal the provisions for additional compensation for such prosecuting attorneys under Sections 56.285 and 56.291, RSMo, and the prosecuting attorneys of such counties are entitled to compensation based on all such sections.

OPINION NO. 35

January 20, 1977

FILED
35

Mr. James P. Anderton
Prosecuting Attorney, Hickory County
County Court House
Hermitage, Missouri 65668

Dear Mr. Anderton:

This opinion is in response to your question asking as follows:

> "Is the proper salary for a Prosecuting Attorney in a Fourth Class County of a valuation of over $10,000,000 and population of less than 7,500 based only on RSMo. 56.280 for a total salary of $5,806.30 or is it based on RSMo. 56.280, 56.285, and 56.291 for a total salary of $7,606.30?"

It is our understanding that Hickory County has a population of approximately 4,500, has a valuation of slightly in excess of $10,000,000, and is a fourth class county.

Section 56.280 was amended in 1972 and 1974 to provide for increases in the salaries of prosecuting attorneys. The present section is Section 56.280, RSMo Supp. 1975.

Section 56.285, RSMo 1969, enacted Laws 1957, p. 330, provides:

> "The prosecuting attorney in counties of the third and fourth classes, in addition to the compensation provided in section 56.280 shall receive eight hundred dollars in third class counties and six hundred dollars in

> fourth class counties per year, as compensation for the additional services performed by him in relation to aid to dependent children as provided in section 208.040, RSMo."

Section 56.291, RSMo, as enacted Laws 1965, p. 165, provides that the prosecuting attorney in third and fourth class counties in addition to his other duties as provided by law shall submit to the Attorney General of the State of Missouri a written brief summarizing the facts and law the lower court proceedings had in all criminal cases appealed to the Supreme Court from the county of his jurisdiction and as compensation shall receive in addition to the compensation provided by law in third and fourth class counties having an assessed valuation of $10,000,000 and less than $20,000,000 the sum of $1,200.

Clearly there would be no question as to the application of Sections 56.285 and 56.291 had it not been for the subsequent amendment of Section 56.280. The only question, as we see it, that you raise is whether Section 56.280 is exclusive and whether the amendment of Section 56.280 was intended to repeal by implication Sections 56.285 and 56.291.

Section 56.280 provides that the prosecuting attorney in counties of the third and fourth classes shall receive annually, as "total compensation for his services" in counties having a population of less than 7,500, the sum of $5,806.30. The provision of that section referring to the "total compensation for his services" was the same in the earlier enactments of Section 56.280.

We do not believe that Section 56.280, RSMo Supp. 1975, was intended to provide for the total compensation of prosecuting attorneys exclusive of Sections 56.285 and 56.291. Neither Section 56.285 nor Section 56.291 was specifically repealed and obviously repeals by implication are not favored.

Furthermore, Section 1.120, RSMo, with respect to the construction of reenactments, provides that the provisions of any statute which is reenacted insofar as they are the same as those of a prior law shall be construed as a continuation of such law and not as a new enactment. For cases relating thereto see V.A.M.S. Annotations, Section 1.120.

Therefore, it is our view that these statutes must be read together and that the prosecuting attorney of Hickory County is entitled to receive the compensation provided for him pursuant

to Sections 56.280, 56.285 and 56.291. The total salary based on such sections, as you indicate, amounts to $7,606.30.

CONCLUSION

It is the opinion of this office that Section 56.280, RSMo Supp. 1975, relating to the compensation of prosecuting attorneys in counties of the third and fourth classes, does not repeal the provisions for additional compensation for such prosecuting attorneys under Sections 56.285 and 56.291, RSMo, and the prosecuting attorneys of such counties are entitled to compensation based on all such sections.

The foregoing opinion, which I hereby approve, was written by my assistant, John C. Klaffenbach.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

OFFICES OF THE
JOHN ASHCROFT
ATTORNEY GENERAL
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY
(314) 751-3321

January 25, 1977

OPINION LETTER NO. 37

Mr. James Walsh, Director
Department of Social Services
P. O. Box 570
Jefferson City, Missouri 65101

Dear Mr. Walsh:

Your predecessor, Lawrence Graham, requested a formal legal opinion of this office on certain questions that pertain to the execution by the Division of Health of the controlled substances law, §§ 195.010-195.320, RSMo Supp. 1976.

These questions are:

> "1. Are the schedules of controlled substances described in Section 195.015 RSMo., 'Rules' within the meaning of Section 536.010 RSMo. 1976?
>
> "2. Assuming an affirmative answer to the first question, must the Division of Health comply with the provisions of 536.021 RSMo., 1976 when a controlled substance is designated, rescheduled or deleted by the Drug Enforcement Administration, U.S. Department of Justice in view of Section 195.015, 4, RSMo."

The controlled substances law establishes five categories or "schedules" of controlled substances in an attempt to grade the substances according to their potential for abuse and addictive properties. § 195.017. The legislature itself initially placed specified substances in the various schedules and directed the Division of Health to subsequently by rule, after public notice and hearing, add substances to the schedules based upon stated statutory criteria. § 195.015, subsections 1, 2, and 3.

The 1976 Amendments to the administrative procedure law, Chapter 536, RSMo, redefined the term "rule." The following part of the new definition appears material to your question:

> "'Rule' means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency. . . ." § 536.010(4), V.A.M.S.

Should the Division of Health exercise the power conferred by § 195.015 to add a controlled substance to one of the statutory schedules, we believe it would be making a "rule" within the meaning of the administrative procedure law.

In response to your second question, § 195.015, subsection 4 provides:

> "If any substance is designated, rescheduled, or deleted as a controlled substance under federal law and notice thereof is given to the division of health, the division of health shall similarly control the substance under sections 195.010 to 195.320 after the expiration of thirty days from publication in the federal register of a final order designating a substance as a controlled substance or rescheduling or deleting a substance, unless within that thirty-day period, the division of health objects to inclusion, rescheduling, or deletion. In that case, the division of health shall publish the reasons for objection and afford all interested parties an opportunity to be heard. At the conclusion of the hearing, the division of health shall publish its decision, which shall be final unless altered by statute. Upon publication of objection to inclusion, rescheduling or deletion under sections 195.010 to 195.320 by the division of health, control under sections 195.010 to 195.320 is stayed until the division of health publishes its decision."

We believe that this statute sets forth a special procedure for designating, deleting, or rescheduling controlled substances

and that in situations where this statute pertains, the general procedures for administrative rule making set forth in Chapter 536, RSMo, do not apply.

Yours very truly,

JOHN ASHCROFT
Attorney General

JOHN ASHCROFT
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

(314) 751-3321

January 7, 1977

OPINION LETTER NO. 38

Dr. Arthur L. Mallory
Commissioner of Education
State Department of Elementary
and Secondary Education
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Dr. Mallory:

This letter is in response to your request for our review and certification of the Department of Elementary and Secondary Education's Application or Amendment for a Grant for Assistance to States for State Equalization Plans, Part D, Title VIII of the Education Amendments of 1974, Public Law 93-380.

Our review has taken into consideration the application which you furnished to us together with Section 842 of Public Law 93-380 (20 U.S.C. 246) and the regulations propounded pursuant thereto by the Office of Education, Department of Health, Education and Welfare, 45 C.F.R. 156 (October 1, 1975); Article III, Section 38(a), Missouri Constitution; and Sections 161.092 and 178.430, RSMo 1969.

It is the opinion of this office that the Missouri State Department of Elementary and Secondary Education is the state agency which has the authority under state law to submit the state plan for the purposes of Section 842, Part D, Title VIII of Public Law 93-380.

Very truly yours,

John D. Ashcroft

JOHN D. ASHCROFT
Attorney General

LIQUOR:
SUNDAY SALES:

Persons holding licenses for the sale of intoxicating liquor by the drink and those holding licenses for the sale of malt liquor only are eligible for "Sunday sale" licenses under Section 311.097, RSMo Supp. 1975.

OPINION NO. 39

FILED
39

February 25, 1977

Mr. Wm. Kenneth Carnes, Director
Department of Public Safety
621 East Capitol Avenue
Jefferson City, Missouri 65101

Dear Mr. Carnes:

This official opinion is issued in response to a request by your predecessor for a ruling on the following questions:

> "Is a person holding a license for the sale of only malt liquor eligible for a 'Sunday sale' license as provided in Section 311.097?
>
> "Is the answer to the above question dependent on local option?"

Section 311.097, RSMo Supp. 1975, states in part:

> "1. Notwithstanding any other provisions of this chapter to the contrary, any person who possesses the qualifications required by this chapter, and who now or hereafter meets the requirements of and complies with the provisions of this chapter, may apply for, and the supervisor of liquor control may issue, a license to sell intoxicating liquor, as in this chapter defined, between the hours of 1:00 p.m. and midnight on Sunday by the drink at retail for consumption on the premises of any restaurant bar as described in the application. As used in this section the term 'restaurant bar' means any establishment having a restaurant or similar facility on the premises at least fifty percent of the gross income of which is derived from the sale of prepared meals or food consumed on such premises.

> "2. . . . all other laws and regulations of the state relating to the sale of liquor by the drink for consumption on the premises where sold shall apply to a restaurant bar in the same manner as they apply to establishments licensed under sections 311.085, 311.090 and 311.095, . . ."

It is clear that this section establishes a separate license to be issued for the sale of liquor by the drink on Sundays. In order to obtain this license a person must meet both the general qualifications required of a liquor by the drink licensee and the specific requirement that at least fifty percent of the gross income of the premises be derived from the sale of prepared meals or food consumed on the premises.

Under Section 311.090, RSMo 1969, requirements for a license for the sale of intoxicating liquor containing alcohol not in excess of five percent by weight (malt liquor) are the same as those for a retail liquor by the drink license. We conclude, therefore, that premises licensed for the sale of malt liquor could upon meeting the requirements of Section 311.097, RSMo Supp. 1975, be licensed for the sale of liquor by the drink on Sunday under that statute.

Section 311.270, RSMo 1969, provides in part:

> "1. It shall be unlawful for any person, holding a license for the sale of malt liquor only, to possess, consume, store, sell or offer for sale, give away or otherwise dispose of, upon or about the premises mentioned in said license, or, upon or about said premises, to suffer or permit any person to possess, consume, store, sell or offer for sale, give away or otherwise dispose of, any intoxicating liquor of any kind whatsoever other than malt liquor brewed or manufactured by the method, in the manner, and of the ingredients, required by the laws of this state. . . ."

While the holder of a license to sell malt liquor only can sell all forms of intoxicating liquors on Sunday under the restaurant bar license, such licensee would be required to remove all intoxicating liquor other than malt liquor from the premises during the week. Of course, as a license to sell liquor by the drink includes the license to sell malt liquor, the licensee could elect simply to continue selling malt liquor on Sunday.

Note that Section 311.097, RSMo Supp. 1975, begins with the statement "Notwithstanding any other provisions of this chapter to the contrary, ..." In Attorney General's Opinion No. 151, Garrett, 4-10-74, this office, in interpreting identical language in Section 311.095, RSMo Supp. 1975, took the position that:

> "It is established law in this state that provisions of a state statute having special application to a particular subject are deemed a qualification of or an exception to another statute on the same subject stated in general terms. Flarsheim v. Twenty Five Thirty Two Broadway Corporation, 432 S.W.2d 245 (Mo. 1968). The legislature, exercising its vested powers, carved such an exception to the local option requirement when it created Section 311.095. No conflict is engendered by the mere fact that now there may be cases wherein the provisions of both statutes cannot be applied effectively. State v. Taylor, 18 S.W.2d 474 (Mo. 1929). The two sections should be construed so that each one may stand and be given its appropriate effect.
>
> "Therefore, it is the opinion of this office that Section 311.095 operates independently of the local option requirements of Section 311.090 and that the Supervisor of Liquor Control may issue a retail liquor by the drink license to a 'resort' as defined by Section 311.095 in a city that has not adopted the local option."

It is the opinion of this office that the identical language in Section 311.097, RSMo Supp. 1975, has the same effect of carving out an exception to the local option requirement of Section 311.090, RSMo 1969.

CONCLUSION

It is the opinion of this office that persons holding licenses for the sale of intoxicating liquor by the drink and those holding licenses for the sale of malt liquor only are eligible for "Sunday sale" licenses under Section 311.097, RSMo Supp. 1975.

Mr. Wm. Kenneth Carnes

The foregoing opinion, which I hereby approve, was prepared by my assistant, Bruce E. Anderson.

Yours very truly,

John Ashcroft

JOHN ASHCROFT
Attorney General

REORGANIZATION ACT:
DEPARTMENT OF REVENUE:

OPINION NO. 41

January 7, 1977

FILED
41

Honorable George Lehr
State Auditor
Capitol Building
Jefferson City, Missouri

Dear Mr. Lehr:

This is in response to your request for an official opinion of this office concerning the question of whether a Deputy Director of Revenue, appointed pursuant to Section 1.6(6) of the Omnibus State Reorganization Act, Appendix B, RSMo Cum. Supp. 1975, can hold such office and legally exercise all powers of the Director of Revenue in the event the Director of Revenue should resign. You have stated that the present Director of Revenue is resigning his office effective January 10, 1977, and it may be some period of time before a new Director of Revenue is appointed and confirmed and in order to assure that all the legal functions of the Director of Revenue are carried out, it is necessary to ascertain whether the Deputy Director appointed by such resigning Director of Revenue has full legal authority to act as Director of Revenue.

We believe that Section 1.6(6) of the Omnibus Reorganization Act is fully dispositive of your question and that such Deputy Director does have full authority to act upon resignation of the present Director of Revenue. That provision provides in part:

> "The director of each department may designate by written order filed with the governor and president pro-tem of the senate a deputy director of the department, to act for and exercise the powers of the director only during the department director's absence for official business, vacation, illness, death, resignation or incapacity. When a deputy director acts as director of the department he shall receive a salary at the level provided for the director of the department when he has acted in such a capacity for longer than thirty days. A deputy director, however, shall not exercise the powers of the director for more than six consecutive months. . . ." (Emphasis supplied)

Thus, it is seen that the legislature has directly anticipated

a situation such as the one presented here. We are advised that the present Director of Revenue has designated by written order, filed with the Governor and President Pro Tem of the Senate, a Deputy Director of the Department. That being the case, upon resignation by the Director of Revenue, that Deputy has full authority to act as Director of Revenue for a period not to exceed six consecutive months, or a shorter period should a new Director of Revenue be appointed and confirmed pursuant to Article IV, Section 51, Constitution of Missouri. Thus, if a new Director of Revenue is appointed while the legislature is in session, the new Director would take office upon receiving the advice and consent of the Senate.

CONCLUSION

It is the opinion of this office that a Deputy Director of Revenue, appointed pursuant to Section 1.6(6) of the Omnibus State Reorganization Act, Appendix B, RSMo Cum. Supp. 1975, can hold such office and legally exercise all powers of the Director of Revenue for a period not to exceed six consecutive months in the event the Director of Revenue should resign.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

PROSECUTING ATTORNEY:
CONCEALED WEAPONS:

Prosecuting attorneys are not conservators of the peace and are, therefore, not exempt from the provisions of Section 564.610, RSMo 1969, relating to carrying of concealed weapons.

OPINION NO. 50

March 2, 1977

FILED
50

Mr. Roy L. Richter
Prosecuting Attorney
Montgomery County
County Courthouse
Montgomery City, Missouri 63661

Dear Mr. Richter:

This is in response to your request for an official opinion on the following question:

> "Whether any statutory authority or case law exists which allows a Prosecuting Attorney to carry a concealable weapon concealed upon his person in his county when engaged in the discharge of the duties imposed upon him by law."

To answer this question, it is first necessary to examine Section 564.610, RSMo 1969, which not only creates the offense of carrying concealed weapons but also establishes certain exemptions therefor. The exemptions provided for by this section are as follows:

> ". . . but nothing contained in this section shall apply to legally qualified sheriffs, police officers and other persons whose bona fide duty is to execute process, civil or criminal, make arrests, or aid in conserving the public peace, nor to persons traveling in a continuous journey peaceable through this state."

We know of no statutory provision which makes it the duty of the prosecuting attorney to execute process or to make arrests. By way of comparison, probation and parole officers are granted

arrest powers and are, therefore, exempt from the provisions of Section 564.610. See Opinion No. 288, Kunderer, 6/28/66.

The question then becomes are prosecuting attorneys conservators of the peace. Many officials are declared by statute to be conservators of the peace. Opinion No. 99, Woodfill, 5/24/56, enumerates certain of these. However, this opinion does not mention prosecuting attorneys, and we are not aware of any statutory provision or case law which would declare prosecuting attorneys to be conservators of the peace.

You mention in your opinion request that prosecuting attorneys, particularly in smaller counties, sometimes do their own investigation and as a result face hazardous situations. Considerations of personal safety, however, would not justify the carrying of a concealed weapon even for a conservator of the peace. State v. Davis, 225 S.W. 707 (Mo. 1920), indicates that a justice of the peace could carry a gun as a conserver of the peace. However, the opinion also indicates that he could not carry a gun simply because his life had been threatened. It must be kept in mind that we are dealing with considerations of what constitutes a prosecuting attorney's "bona fide duty." Thus, in a situation in which a prosecuting attorney's personal safety is not threatened, is it his duty to subdue one who is breaking the peace? We believe that it is not.

CONCLUSION

It is the opinion of this office that prosecuting attorneys are not conservators of the peace and are, therefore, not exempt from the provisions of Section 564.610, RSMo 1969, relating to carrying of concealed weapons.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Robert Presson.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosures: Op. No. 288, 6/28/66, Kunderer
Op. No. 99, 5/24/56, Woodfill

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

July 19, 1977

OPINION LETTER NO. 52

Honorable Abe Paul
Prosecuting Attorney
McDonald County Courthouse
Pineville, Missouri 64856

Dear Mr. Paul:

This letter is in response to your question asking:

> "1. If the County Treasurer if a third class county becomes incapacitated due to ill health, does the County Court have authority to pay additional help to act in her absence?
>
> "1a. Does this situation fall within the emergency category of 50.540(4) if the County Court does not have statutory authority to act according to the statutes dealing with the duties of County Treasurer."

You also state:

> "The County Treasurer has become incapacitated due to ill health and hired a deputy to act while she is absent from the office. She has requested of the County Court budgetary authority to pay the deputy in addition to her own salary. She has stated that this is a temporary 'emergency' situation that would allow such County Court action despite an apparent prohibition in the statutes of her office."

Honorable Abe Paul

Subsection 4 of Section 50.540, to which you refer, authorizes transfers of funds for unforeseen emergencies on an unanimous vote of the county court; but obviously funds in any event can only be used for lawful purposes.

We find no statutory provision authorizing the appointment of additional help to act in the absence of the treasurer. In our Opinion No. 49 dated September 10, 1952, to Kirkland, copy enclosed, to which you refer, we concluded that such an outlay is not an indispensable expense necessary to the successful and efficient conduct of the office which has not already been provided for. We concluded that the county court did not have the authority to reimburse the county treasurer for clerical help hired during the period when such treasurer was incapacitated due to illness and unable to attend to the duties of the office. We believe that this opinion is applicable in these circumstances and answers your question.

Therefore, in direct answer to your question, the county court does not have authority to pay for clerical help hired to perform the duties of the treasurer when the treasurer is incapacitated due to illness.

We also enclose Opinion No. 88-1977, to MacPherson, which is self-explanatory.

Yours very truly,

John Ashcroft

JOHN ASHCROFT
Attorney General

Enclosures: Op. No. 49
Kirkland, 1952

Op. No. 88
MacPherson, 1977

OFFICES OF THE

JOHN ASHCROFT
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

(314) 751-3321

December 30, 1977

OPINION LETTER NO. 53

Mr. William C. McIlroy
Prosecuting Attorney
Pike County, Courthouse
Bowling Green, Missouri 63334

Dear Mr. McIllroy:

This letter is in response to your opinion request asking as follows:

> "May the general funds of a County hospital be used for the payment of attorney's fees for individual counsel employed by certain individual members of the Board of Trustees who have been made defendants in a suit brought by a former employee of the hospital alleging interference with a contractual obligation?"

You also set out certain facts regarding the matter which we will not repeat because you indicate that the matter is presently in litigation.

It is our understanding that you have declined to represent these defendants because the defendants, in your view, are not being sued in their official capacities and therefore you have taken the position that you are counsel for the Pike County Memorial Hospital but not for the Board of Trustees as individuals.

It is our view that the last controlling case in the Missouri Supreme Court, County of St. Francois v. Brookshire, 302 S.W.2d 1 (Mo. 1957) answers your question. The court in that case has stated at l.c. 3, 4:

> ". . . The proceeding did not involve any suit by or against St. Francois County, and therefore the county court did not have the authority pursuant to Section 56.250 [with respect to employment of special counsel] to employ defendant on behalf of the county. 'Anyone may be sued, whether public officer or employee, or a private citizen; he may be charged with any kind of commission or ommission, and in such case he must defend himself, whether the action be meritorious or groundless. Though it be an unjust burden on one so required to defend an action, it is nevertheless his burden and his obligation, whether he be private citizen or public official or employee.' City of Nampa v. Kibler, 62 Idaho 511, 113 P.2d 411, 413. Absent statutory authority, or possibly some unusual situation of which we are not now aware, a public official who is sued as an individual because he did or did not do certain things in his public office is not entitled to counsel at public expense. Annotation, 130 A.L.R. 736."

In an earlier case, State ex rel. Crow v. City of St. Louis, 73 S.W. 623 (Mo. 1903), the Missouri Supreme Court held that the city of St. Louis had the authority to indemnify a police officer from loss arising out of a suit against him because of an accidental shooting occurring in the course of his employment. We do not regard that case as authority in this instance inasmuch as the city involved was a charter city and the Missouri Legislature has not seen fit to authorize the county to indemnify its officers.

We believe the Brookshire case answers your question.

Very truly yours,

JOHN ASHCROFT
Attorney General

LIBRARIES:
CITY LIBRARIES:

The Jefferson City Library Board has no authority to establish a fund other than the funds specifically provided for by statute.

OPINION NO. 54

June 21, 1977

FILED
54

Honorable James R. Strong
State Representative, District 119
Room 106, Capitol Building
Jefferson City, Missouri 65101

Dear Representative Strong:

This is in response to your request for an opinion as to whether the Jefferson City Library Board has the authority to establish a fund other than one of those provided for in Sections 182.200 and 182.260, RSMo. The facts giving rise to this request are as follows: The board of trustees of the Jefferson City Library owned the Carnegie Free Public Library Building in Jefferson City, which was sold when a new library was constructed.

Under a cooperative agreement, the costs of operation of the Thomas Jefferson Library System are shared by the Jefferson City Library, Cole County Library District and three other county library districts as members of the Thomas Jefferson Library System. However, the Jefferson City Library Board maintains city library funds under Section 182.140 (City Library Fund) and Section 182.260 (Library Building Fund). The proceeds of the sale of the Carnegie Free Public Library Building belong to the Jefferson City Library District.

Section 182.140, RSMo, provides for an election to establish a tax to provide for free public libraries in certain cities. Subsection 2 provides in part:

> ". . .The proceeds of the levy, together with all interest accruing on same, with library fines, collections, bequests and donations in money shall be deposited in the city treasury and shall be known as the 'city library fund', . . ."

Section 182.200, RSMo, pertaining to powers of the board of trustees, provides in part:

> "4. They shall have the exclusive control of the expenditure of all moneys collected to the credit of the library fund, and of the construction of any library building, and of the supervision, care and custody of the grounds, rooms or buildings constructed, leased or set apart for that purpose. All moneys received for the library shall be deposited in the city treasury to the credit of the city library fund, . . ."

Section 182.260, RSMo, provides for levying a tax for the erection of free public library buildings and the establishment of a separate fund to be known as the "Library Building Fund."

Any reasonable doubt concerning the existence of the power of a municipal corporation is resolved against the municipal corporation. Maryville v. Farmers Trust Company of Maryville, 45 S.W.2d 103 (K.C.Mo.App. 1931).

A municipal corporation is but a creature or political subdivision of the state, and, therefore, in possession only of such powers and authority as are conferred upon it by express or implied provisions of law. State v. Steinbach, 274 S.W.2d 588 (St.L.Ct.App. 1955).

The Kansas City Court of Appeals said in the case of City of Meadville v. Caselman, 227 S.W.2d 77, 79-80 (K.C.Mo.App. 1950):

> "In the case of the City of St. Louis v. King, 226 Mo. 334, 126 S.W. 495, 497, 27 L.R.A.,N.S., 608, 138 Am.St.Rep. 643, our Supreme Court said: 'In Knapp v. Kansas City, 48 Mo.App. 485, the doctrine is tersely stated to be: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and none others: First, those granted in express words: second, those necessarily or farily implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation--not simply convenient, but indispensable. . . ."'"

In view of the fact that the legislature has provided for the establishment of certain funds for library districts, it is our view that the establishment of an additional fund by a district is not expressly granted, not necessarily or fairly implied in or incident to powers expressly granted and not essential or indispensable to the objects and purposes of the district.

We do not express any view as to the effect of the cooperative agreement entered into August 3, 1966 between the library boards of Jefferson City, Cole County, Miller County, Osage County and Maries County on the question you have asked.

CONCLUSION

It is the opinion of this office that the Jefferson City Library Board has no authority to establish a fund other than the funds specifically provided for by statute.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Bruce E. Anderson.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

SNOWMOBILES:
MOTOR VEHICLES:
DRIVERS' LICENSES:

A snowmobile is not required to be registered and licensed as a motor vehicle, but it is unlawful to operate a snowmobile upon the highways of this state if it is not properly equipped and if the operator is not properly licensed.

OPINION NO. 56

August 29, 1977

FILED
56

Honorable Norwood Creason
Representative, District 16
Room 412, State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Creason:

This is in answer to your request for an opinion from this office as follows:

> "1. Do snowmobiles fall within the classification of 'motor vehicles for the purpose of required licensing and registration under Section 301.020 RSMo 1969 before they can be lawfully operated on the highways of this state?
>
> "2. If the answer to No. 1 is in the negative, are there laws which prohibit the operation of a snowmobile upon the highways of the State of Missouri?"

You do not describe a snowmobile. We understand that there are a wide variety of snowmobile designs. For the purpose of this opinion we will assume that a snowmobile is a self-propelled machine which travels on two fabric and rubber endless belts, one on each rear side of the machine, kept in motion by two driving wheels so that the machine moves forward with the revolutions of the belts, with skids in front.

You inquire whether a snowmobile is required to be licensed and registered under the provisions of Section 301.020, RSMo 1969, before it can be lawfully operated on the highways of the state.

The licensing and registration of motor vehicles is governed by Chapter 301, RSMo. Section 301.010, as amended by Laws 1974, provides that as used in Chapter 301 the following terms mean:

> "(15) 'Motor vehicle', any self-propelled vehicle not operated exclusively upon tracks, except farm tractors;
>
> * * *
>
> "(31) 'Vehicle', any mechanical device on wheels, designed primarily for use on highways, except those propelled or drawn by human power, or those used exclusively on fixed rails or tracks."

Section 301.020 requires every owner of a motor vehicle which shall be operated or driven upon the highways of this state to apply for registration of such vehicle with the Director of Revenue.

A snowmobile, as we describe the machine, is a self-propelled vehicle not operated exclusively on tracks and would come within the definition of a motor vehicle under paragraph (15) if it is a "vehicle." The term "vehicle," as used in this chapter, is defined as any mechanical device on wheels, designed primarily for use on highways, and is to be included in the definition of "motor vehicle" which has to be registered under this chapter. Unless it is a mechanical device on wheels, it does not come within the definition of a motor vehicle which is required to be registered and licensed under Chapter 301. Only motor vehicles as defined in Chapter 301 are required to be licensed for operation upon the highways of this state. Highway is defined in Section 301.010 as any public thoroughfare for vehicles including state roads, county roads, and public streets, avenues, boulevards, parkways, or alleys in any municipality. It is our opinion that a snowmobile is not a mechanical device on wheels since it gets its traction for mobility to move forward from the revolution of the belts and not from wheels. Further, it is our understanding snowmobiles are not designed primarily for use on highways. Therefore, snowmobiles are not required to be registered and licensed under Chapter 301 before being operated on the highways of this state.

In answer to your second question asking whether there are any laws which prohibit the operation of a snowmobile upon the highways of this state, it is our opinion that there are no laws which expressly prohibit the use of snowmobiles on such highways.

There are some statutory regulations which do apply to the operation of snowmobiles upon the highways of the state such as traffic regulations and vehicle equipment regulations. Chapter 302, RSMo, dealing with driver's and chauffeur's licenses applies to persons operating snowmobiles because of the definition of motor vehicles in that chapter. That definition, found in Section

302.010(9), RSMo 1969, is ". . . any self-propelled vehicle not operated exclusively upon tracks." Snowmobiles come within this definition. Further, snowmobile operators are not within any specific exemption to the requirements of Chapter 302.

Sections 304.014 to 304.026, RSMo, dealing with traffic regulations, apply to snowmobiles. The definitional section applicable to those sections is Section 304.025.2, RSMo 1969, wherein vehicle is defined to mean ". . . any device operated on highways, except those used exclusively on rails or tracks." This would clearly place snowmobiles within the provisions of those sections.

The light regulations of Sections 307.020 to 307.120, RSMo 1969, also apply to snowmobiles. See Section 307.020(8), RSMo, which defines vehicle as:

> ". . . every device in, upon or by which a person or property is or may be transported upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks;"

Also, the vehicle equipment safety compact, Section 307.250, Article II(a), RSMo 1969, defines vehicle as:

> ". . . every device in, upon or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks."

Therefore, the compact would be applicable to snowmobiles.

The motor vehicle safety inspection law, Section 307.350, RSMo Supp. 1975, would not apply to snowmobiles since it refers for its definition back to Chapter 301, which does not apply to snowmobiles.

We avoid a detailed discussion of all of the possible statutory interpretations respecting snowmobiles because such a detailed examination of the laws should be made on a case-by-case basis. For the same reason, we do not pass upon the application of city ordinances to snowmobiles.

CONCLUSION

It is the opinion of this office that a snowmobile is not required to be registered and licensed as a motor vehicle but

that it is unlawful to operate a snowmobile upon the highways of this state if it is not properly equipped and if the operator is not properly licensed.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

John Ashcroft

JOHN ASHCROFT
Attorney General

See: State ex rel. Lack v. Melton, 629 S.W.2d 302 (Mo. banc 1985).

COUNTY COURT:
DEPUTY ASSESSORS:
ASSESSORS:

A county assessor in a third class county may appoint such clerks and deputies as he deems necessary subject to the approval of the county court.

See OP 211-77

OPINION NO. 60

April 8, 1977

FILED
60

Mr. Abe R. Paul
Prosecuting Attorney
McDonald County, Courthouse
Pineville, Missouri 64856

Dear Mr. Paul:

This letter is in response to your question asking:

"1. Does the County Court have authority to hire an additional clerical or stenographic assistant due to illness and incapacity of the elected Assessor.

"1a. Does the County Assessor have authority to hire an additional clerk or deputy assistant to assume the duties or perform in the absence of the duly elected assessor who is incapacitated due to illness?"

You also state:

"The elected assessor is presently incapacitated due to illness and unable to carry out the duties of his office. The County Court had, prior to his illness, budgeted for one deputy to assist him in the office at the assessor's request. The assessor has requested an additional sum of money in his current budget to hire another deputy to serve in his absence while he is out of his office."

McDonald County is a third class county. The applicable section is Section 53.071, RSMo Supp. 1975. Subsection 1 of that section provides in pertinent part as follows:

> ". . . each county assessor, except in counties of the first class, shall receive an annual salary for his services and shall, subject to the approval of the county court, appoint the additional clerks and deputies that he deems necessary for the prompt and proper discharge of the duties of his office. A portion of each county assessor's salary and of the salaries for his clerks and deputies shall be paid by the state in an amount equal to the sum paid by the state for assessor's, clerks', and deputies' compensation in that county in the year 1969, and the remainder of the assessor's salary and the salaries for his clerks and deputies shall be paid by his county. . . ."

It is our view that even though the assessor is incapacitated and the deputy in this instance would be hired to help in his absence, there is sufficient authority in the provisions of Section 53.071 for the assessor to hire such a deputy subject to the approval of the county court.

CONCLUSION

It is the opinion of this office that a county assessor in a third class county may appoint such clerks and deputies as he deems necessary subject to the approval of the county court.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

LIMITED DRIVING PRIVILEGES:
MOTOR VEHICLES:
DRIVERS' LICENSES:
LICENSES:

A magistrate court which convicts a driver, who is driving under a court order of a different court granting hardship driving privileges, of an offense which results in the assessment of points under the provisions of Section 302.302, RSMo Supp. 1975, other than a violation of a municipal stop sign ordinance where no accident is involved, is required, under Section 302.309, RSMo, to notify the driver, the director of revenue and the court which granted the order, of the conviction. Such magistrate court does not have the authority to require that the defendant surrender the order granting hardship driving privileges, although such order is terminated as a matter of law.

OPINION NO. 61

June 28, 1977

FILED
61

Mr. C. E. Hamilton, Jr.
Prosecuting Attorney
Callaway County, Courthouse
Fulton, Missouri 65251

Dear Mr. Hamilton:

This is in response to your request for an opinion of this office asking whether, a magistrate court which convicts the holder of a limited driving order issued by a different court under Section 302.309, RSMo, of a driving offense which terminates such order under such section, has authority to require the surrender of the order of the court which granted the limited driving privilege.

Section 302.309, RSMo, provides that when any court of record having jurisdiction finds that a chauffeur or operator is required to operate a motor vehicle in connection with his business, occupation or employment, the court, if certain conditions are met, may grant such limited driving privilege as the circumstances of the case justify if the court also finds undue hardship on the individual in earning a livelihood, and while so operating a motor vehicle within the restrictions and limitations of the court order the driver shall not be guilty of operating a motor vehicle without a valid driver's license. It further provides in part as follows:

> "(4) The court order granting the hardship driving privilege shall indicate the termination date of the order, which shall be not later than the end of the period of suspension or revocation. A copy of the order shall be sent by the clerk of the court to the director, and a copy shall be given to the driver which shall be carried by him whenever he operates a motor vehicle. A conviction which results in the assessment of points under the provisions of section 302.302, other than a violation of a municipal stop sign ordinance where no accident is involved, against a driver who is operating a vehicle under the authority of a court order terminates the order, and the court in which the conviction occurs shall immediately so notify the driver, the director and the court which granted the order."

Under this subsection, the operator is required to carry with him a copy of the court order whenever he is operating a motor vehicle. If he is convicted of a violation which results in the assessment of points under the provisions of Section 302.302, RSMo Supp. 1975, other than a violation of a municipal stop sign ordinance where no accident is involved, such conviction terminates the order and the court in which the conviction occurs must immediately notify the driver, the director and the court which granted the order.

We find no authority for the court in which the last conviction is had to require the surrender of the order of the court which granted the hardship driving privilege. Such order at that point becomes functus officio. However, the legislature has not authorized the court in which the conviction is had to make any endorsement upon the order granting the hardship driving privilege or to require the defendant to surrender such order. The authority of the convicting court is limited to notifying the driver, the director of revenue and the court which granted the order of the subsequent conviction resulting in the assessment of points.

CONCLUSION

It is the opinion of this office that a magistrate court which convicts a driver, who is driving under a court order of a different court granting hardship driving privileges, of an

offense which results in the assessment of points under the provisions of Section 302.302, RSMo Supp. 1975, other than a violation of a municipal stop sign ordinance where no accident is involved, is required, under Section 302.309, RSMo, to notify the driver, the director of revenue and the court which granted the order, of the conviction. Such magistrate court does not have the authority to require that the defendant surrender the order granting hardship driving privileges, although such order is terminated as a matter of law.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

AMBULANCE DISTRICTS: An ambulance district may borrow money and become indebted in an amount not in excess of the anticipated revenue for the current year plus any unencumbered balances from previous years without a vote by the people.

OPINION NO. 62

March 9, 1977

FILED
62

Honorable Ron Bockenkamp
Missouri House of Representatives
Room 116B, State Capitol
Jefferson City, Missouri 65101

Dear Mr. Bockenkamp:

This is in answer to your opinion request of recent date in which you ask the following question:

> "Can an ambulance district organized under chapter 190 RSMo borrow money without issuing bonds or holding a special election as called for by Section 190.065 RSMo."

Section 190.065, RSMo Supp. 1975, to which you refer in your opinion request, provides in part as follows:

> "1. For the purpose of purchasing any property or equipment necessary or incidental to the operation of an ambulance service, the board of directors may borrow money and issue bonds for the payment thereof in the manner provided herein. The question of the loan shall be decided at a special election ordered by the board of directors of the district and held at such time as the board of directors designates. Notice of the election, the amount and the purpose of the loan shall be given as provided in section 190.035.
>
> "2. The qualified voters at the election shall vote by ballot, which shall be in substantially the following form:

(Amount and purpose of loan)

For the loan ☐

Against the loan ☐

A cross mark (X) in the square before the words 'for the loan' shall be counted as a vote for the bonds, a cross mark (X) before the words 'against the loan' shall be counted as a vote against the bonds.

If two-thirds of the votes cast are for the loan, the board shall, subject to the restrictions of subsection 3, be vested with the power to borrow money in the name of the district, to the amount and for the purposes specified on the ballot, and issue the bonds of the district for the payment thereof."

Section 190.060, RSMo Supp. 1975, provides in part as follows:

"1. An ambulance district shall have and exercise the following governmental powers, and all other powers incidental, necessary, convenient or desirable to carry out and effectuate the express powers:

* * *

(5) To borrow money and to issue bonds, notes, certificates, or other evidences of indebtedness for the purpose of accomplishing any of its corporate purposes, subject to compliance with any condition or limitation set forth in sections 190.005 to 190.085 or otherwise provided by the Constitution of the state of Missouri;"

It is our view that the provisions of Section 190.065, requiring a vote by the people, are applicable only when an ambulance district desires to become indebted in an amount greater than the amount of revenue anticipated for the current year, plus unencumbered balances from previous years. It is our view that under the provisions of Section 26(a) of Article VI of the Constitution

of Missouri the ambulance district is authorized to become indebted in an amount not "exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years." Section 26(a) of Article VI of the Missouri Constitution provides as follows:

> "No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this constitution."

Ambulance districts under provisions of Section 190.010(2), RSMo Supp. 1975, are "political subdivisions of the state."

The Supreme Court of Missouri held that Section 26(a) of Article VI of the Constitution of Missouri is self-enforcing in the case of First National Bank of Stoutland v. Stoutland School District, 319 S.W.2d 570 (Mo. 1958). The court said l.c. 572-573:

> "In July 1949, Stoutland School District R2 of Laclede and Camden counties became a reorganized school district with its school building in Stoutland and Camden County designated as the county to which it belonged. V.A.M.S., Secs. 165.657 to 165.707. When the district started operations in September 1951, it, of course, had no working capital and insufficient funds with which to pay its current operating expenses. The district was dependent upon the receipt of its portion of taxes which were not collected and distributed to the district so as to correspond with its current expenses and obligations. At one point, for example, in 1953 there were no funds on hand and no assurance that salaries would be paid and the teachers refused to continue with their contracts and school was closed for two weeks. To meet the exigencies of this perpetual situation and, as one of the witnesses said, 'to prevent the interruption of school,' the school board, each year, secured advances and borrowed money from the plaintiff bank and after its share of the revenue came in

repaid the loans. 1953 was a typical year; by February there were no funds and the school board met for the purpose of authorizing its officers to enter into a loan arrangement with the bank. At this meeting, at which minutes were regularly kept, the board passed a resolution authorizing its officers to borrow $6,000 from the bank at 6% interest. On February 10th the cashier of the bank, after examining the minutes, deposited $6,000 in the district's account and subsequently the district issued checks against the account in payment of teachers' salaries, bus transportation and other usual school expenses. In similar circumstances on February 14th and again on April 18th the board borrowed and the bank advanced the further sums of $10,000 and $15,000, and thus in 1953 the district borrowed a total of $31,000. While, as has been said, the board frequently had no funds on hand with which to meet current expenses, the loans were always made in anticipation of its revenue and each calendar year in which the loans were made the district eventually received from tax sources more than enough revenue to repay the loans; for example, its ascertainable anticipated revenue for the calendar year 1953 was $120,426.74, the unencumbered anticipated sum on the date of the $6,000 loan being $99,839.42.

"Admittedly, no constitutional or statutory provision expressly authorizes a school district to borrow money in this or any other manner. Nevertheless, Section 26(a) of Article 6, Const.Mo. 1945, is a self-enforcing grant of power to school districts to incur an indebtedness for public school purposes in an amount not 'exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years * * *.' State ex rel. Gilpin v. Smith, 339 Mo. 194, 96 S.W.2d 40; State ex Inf. Dalton v. Metropolitan St. Louis Sewer Dist., 365 Mo. 1, 275 S.W.2d 225; Bull v. McQuie, 342 Mo. 851, 119 S.W.2d 204; State ex rel. Clark County v. Hackmann, 280 Mo. 686, 218 S.W. 318; Trask v. Livingston County, 210 Mo. 582, 109 S.W. 656, 37

> L.R.A.,N.S., 1045; Book v. Earl, 87 Mo. 246. A constitutional limitation on the extent, amount, or purpose of a school district's borrowing power is not a limitation on its authority to incur any indebtedness whatever (79 C.J.S. Schools, and School Districts § 325(b), p. 15), and, as of course, the payment of its debts and obligations, legally incurred, is a public school purpose. State ex rel. Gilpin v. Smith, supra; State ex rel. Clark County v. Hackmann, supra. . . ."

The power of an ambulance district to borrow money under provisions of Section 26(a) of Article VI of the Constitution is recognized by the provisions of Section 190.060.1(5).

CONCLUSION

It is, therefore, the opinion of this office that an ambulance district may borrow money and become indebted in an amount not in excess of the anticipated revenue for the current year plus any unencumbered balances from previous years without a vote by the people.

The foregoing opinion, which I hereby approve, was prepared by my assistant, C. B. Burns, Jr.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

TAXATION:
ASSESSMENT:
NEW MOTOR VEHICLES:

The assessed valuation of new motor vehicles held for sale in the ordinary course of business is to be determined pursuant to Section 150.040(2), and that this amount is not to be further reduced by virtue of Section 137.115, RSMo Supp. 1975.

March 17, 1977 OPINION NO. 64

Robert F. Love, Chairman
Missouri State Tax Commission
P.O. Box 146
Jefferson City, Missouri 65101

Dear Mr. Love:

This is in response to your request for an official opinion from this office answering the following question:

> "Does §137.115 [RSMo Supp. 1975], requiring assessors to assess all property at 33 1/3% of true value, apply to Senate Bill No. 820 [now enacted as §§ 150.035 and 150.040, RSMo Supp. 1976], which provides that the inventory valuation for assessment of the ad valorem tax on new vehicles shall be 9.5% of the gross amount received from sales by merchants for new motor vehicles sold by them from January 1 through March 31, of each year?"

Although there appears to be some serious constitutional problems with the statutory classification of new motor vehicles which is set forth in Section 150.040(2), RSMo Supp. 1976, this opinion does not address itself to that issue. For purposes of answering your question, the constitutionality of the statute is presumed.

Section 137.115, RSMo Supp. 1975, provides the general rule regarding the assessment of real and tangible personal property in Missouri. This section requires the assessor or his deputies in all counties of this state including the City of St. Louis to assess real and tangible personal property at 33 1/3% of its true value in money. The applicable ad valorem tax rate is then levied upon this assessed valuation.

However, in enacting Section 150.040(2), RSMo Supp. 1976, the legislature has set forth a different method for assessing new motor vehicle inventories. The relevant provision of the act in question reads as follows:

> "Merchants shall pay an ad valorem tax equal to that which is levied upon real estate on new motor vehicles. The inventory valuation for assessment purposes for the ad valorem tax on new motor vehicles shall be nine and one-half percent of the gross amount received from sales by merchants for new motor vehicles sold by them from January first through March thirty-first of each year, and the assessor of each county and the city of St. Louis shall have the authority to inspect the books of each merchant for the purpose of determining said sales."

The legislature has placed new motor vehicles held for sale in the ordinary course of business in a separate class for purposes of tax assessment. The "assessed valuation" of other real and tangible personal property is arrived at by taking 33 1/3% of the property's true value in money, pursuant to Section 137.115, RSMo Supp. 1975. However, the "assessed valuation" of an automobile dealer's inventory of new motor vehicles is now to be determined by taking 9 1/2% of the gross amount received from the sales of new motor vehicles between January 1 and March 31 of each year pursuant to Section 150.040(2). The first sentence of Section 150.040(2) merely provides that the rate of the ad valorem tax levied on new motor vehicle inventories shall be "equal to that which is levied upon real estate".

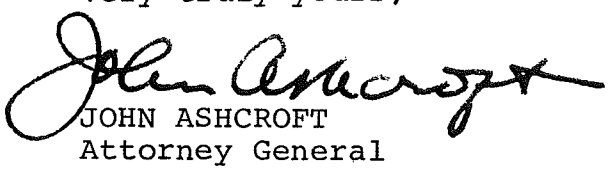
Had the legislature intended the valuation arrived at pursuant to Section 150.040, RSMo Supp. 1976, to be further reduced for assemment purposes to 33 1/3%, it would have so provided. On the contrary, the legislature clearly stated that 9 1/2% of the gross amount received from sales of new motor vehicles during the first three months of each year shall be the inventory valuation of these vehicles for assessment purposes.

CONCLUSION

Therefore, it is the opinion of this office that the assessed valuation of new motor vehicles held for sale in the ordinary course of business is to be determined pursuant to Section 150.040(2), and that this amount is not to be further reduced by virtue of Section 137.115, RSMo Supp. 1975.

The foregoing opinion, which I hereby approve, was prepared by my assistant, S. Joel Wilson.

Very truly yours,



JOHN ASHCROFT
Attorney General

POLICE:
CITY POLICE:
CITIES, TOWNS & VILLAGES:
INITIATIVE & REFERENDUM:

A fourth class city board of aldermen which has, with the approval of the voters, provided for the appointment of a chief of police under the provisions of Section 79.050, RSMo, has the authority to repeal such ordinance without approval of the voters and to reestablish the office of city marshal.

OPINION NO. 65

February 23, 1977

FILED
65

Honorable William E. Seay
Missouri House of Representatives
Room 315, State Capitol
Jefferson City, Missouri 65101

Dear Representative Seay:

This opinion is in response to your question asking as follows:

> "In what manner does a City of the 4th Class in the State of Missouri which has voted by majority vote under the terms of 79.050 of the 1969 Revised Statutes of Missouri as amended to create the position of an appointed Chief of Police negate that action and restore the office of an elected City Marshal and abolish the office of appointive Chief of Police."

Section 79.050, RSMo, to which you refer, provides:

> "The following officers shall be elected by the qualified voters of the city, and shall hold office for the term of two years and until their successors are elected and qualified, to wit: Mayor and board of aldermen. The board of aldermen may provide by ordinance, after the approval of a majority of the voters voting at an election at which the issue is submitted, for the appointment of a collector and for the appointment of a chief of police who shall perform all duties required of the marshal by law, and any other police officers found by the board of aldermen to be necessary for the good government

> of the city. If the board of aldermen does not provide for the appointment of a chief of police and collector as provided by this section, a city marshal and collector shall be elected, and the board of aldermen may provide by ordinance that the same person may be elected marshal and collector, at the same election, and hold both offices and the board of aldermen may provide by ordinance for the election of city assessor, city attorney, city clerk and street commissioner, who shall hold their respective offices for a term of two years and until their successors shall be elected or appointed and qualified." (Emphasis added)

This office previously held in Opinion Letter No. 166, issued February 18, 1971, to Sponsler, that the initiative could not be used to reestablish the office of elected marshal under Section 79.050. A copy of that opinion is enclosed, as well as the opinion on which it relied, Opinion Letter No. 100, issued December 1, 1961, to Young. This view is also stated in McQuillin, Municipal Corporations, 3rd Ed., Vol. 5, §16.49:

> ". . . In no event, however, can a municipality submit an ordinance to a vote of electors without legal authorization, which must come from the constitution itself or from a provision of the charter or statute. . . ."

Since we have no provision for submitting to the voters the question of whether or not the office should revert to that of marshal, we must look to the language of the section itself and to the powers of the board of aldermen to determine how this may be accomplished.

You will note that we have underscored the pertinent portion from Section 79.050, which provides that the board of aldermen may provide by ordinance after the approval of a majority of the voters, for the appointment of a chief of police to perform the duties of the marshal. The word "may" is permissive generally in its ordinary sense and we believe that it is used in that manner here. See Chapter 1, RSMo, Construction of Statutes. See also Opinion No. 149, issued April 22, 1964, to O'Brien, copy enclosed. The language of the statute is clear and concise and means simply that the board of aldermen has the authority to pass an ordinance abolishing the office of marshal if the voters have given prior approval to this exercise of authority. There is

nothing in the statute which requires that the matter of reestablishing the office of city marshal be resubmitted to the voters. The board of aldermen having the authority to enact the ordinance establishing the office of chief of police and abolishing the office of city marshal similarly has the authority to repeal the ordinance and to reestablish the office of city marshal.

It has been stated even with respect to ordinances adopted by the initiative (where the initiative is authorized) that in the absence of constitutional or statutory limitations a municipal council of a noncharter city has the power to amend or repeal such an ordinance adopted by the electors of the city. McQuillin, Municipal Corporations, 3rd Ed., Vol. 6, §21.03, citing State v. Cartledge, 195 N.E. 237 (Ohio).

We assume in answering your question that the city has not purported to provide for any term or tenure rights for the city police chief and therefore we do not direct ourselves to such questions.

CONCLUSION

It is the opinion of this office that a fourth class city board of aldermen which has, with the approval of the voters, provided for the appointment of a chief of police under the provision of Section 79.050, RSMo, has the authority to repeal such ordinance without the approval of the voters and to reestablish the office of city marshal.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Enclosures: Op. Ltr. No. 166
2/18/71, Sponsler

Op. Ltr. No. 100
12/1/61, Young

Op. No. 149
4/22/64, O'Brien

APPROPRIATIONS:
GENERAL ASSEMBLY:
UNIVERSITY OF MISSOURI:
CONSTITUTIONAL LAW:

The legislature is not prohibited by Article IX, Section 9(a), Constitution of Missouri, when appropriating from general revenue to the Board of Curators for the University of Missouri, from specifying amounts for each campus.

OPINION NO. 68

February 23, 1977

FILED
68

Honorable Donald L. Manford
State Senator, District 8
Room 221, State Capitol Building
Jefferson City, Missouri 65101

Dear Senator Manford:

This is in response to your request for an official opinion of this office concerning the question of whether the General Assembly has the constitutional authority, when appropriating moneys from general revenue for the University of Missouri, to specify items and purposes in any more detail than one "lump sum" to the Board of Curators for the entire university system. You have suggested that the legislature is considering instead of the "lump sum" appropriation for the university system which has basically been utilized in the past recent years, that appropriations be "itemized" at least by specifying amounts for each campus.

The difference between these two approaches in appropriations was stated in Starling Realty Corporation v. State, 20 N.Y.S.2d 878, 883 (1940), as follows:

> "[4] Further to the claim that moneys were in fact available, some reference should be made to the difference between a lump sum appropriation and an itemized line appropriation. The lump sum appropriation leaves the allocation of the sum appropriated to the Board or body for whom the appropriation is made, while in the itemized line appropriation, the allocation or segregation is made by the Legislature. Nellis v. State, 204 App.Div. 176, 197 N.Y.S. 762."

The General Assembly has the power to enact any law not prohibited by the Constitution, for the State Constitution, unlike

the Federal Constitution which is a grant of power, is a limitation on legislative power. State ex inf. Danforth v. Merrell, 530 S.W.2d 209 (Mo.Banc 1975). In particular the power of the General Assembly with respect to public funds, subject to constitutional limitations, is supreme. State ex rel. Davis v. Smith, 75 S.W.2d 828 (Mo.Banc 1934).

In carrying out this power, the legislature must specify sums of money, defined as an "item" in State ex rel. Cason v. Bond, 495 S.W.2d 385 (Mo.Banc 1973), and for each item must specify a purpose for which the money is to be spent. Article IV, Sections 23 and 28, Constitution of Missouri; and see, State ex inf. Danforth v. Merrell, supra at 213.

The Constitution does not specify, however, what is required or proper as to items and purposes and, in particular, does not specify whether lump sum appropriations state a sufficient purpose. The question of the validity of lump sum appropriations is not before us and we do not opine on the question. As to more itemized appropriations, while also not opining on the validity of any specific appropriations, we do note the court's approval of appropriations by divisions of departments and for each division three generally recognized purposes of personal service, equipment purchase and repair, and operations. The court also approved appropriations for parts or subpurposes of these three purposes. State ex inf. Danforth v. Merrell, supra, and also State ex rel. Cason v. Bond, supra.

Thus, the power of the General Assembly to appropriate by line item to the Board of Curators is supreme unless prohibited by some provision of the Constitution of Missouri.

It is suggested that Article IX, Section 9(a), Constitution of Missouri, is such a prohibition and that State ex rel. Curators of University of Missouri v. McReynolds, 193 S.W.2d 611 (Mo.Banc 1946), and State ex rel. Thompson v. Board of Regents for Northeast Missouri State Teachers' College, 264 S.W. 698 (Mo.Banc 1924), support such conclusion. Article IX, Section 9(a), provides:

> "The government of the State University shall be vested in a board of curators consisting of nine members appointed by the governor, by and with the advice and consent of the senate."

It was held in McReynolds, supra at 613, that the Board of Curators has sole control and custody of the fees received from dormitories and dining rooms. The court, however, did not base the decision on the predecessor of Article IX, Section 9(a), but based such decision on Thompson and a statute expressly excepting such fees from the requirement they be placed in the treasury.

The Thompson case, which is often cited as authority for independent status of the University of Missouri, held that moneys received by a state college from insurance after a building was destroyed by fire did not have to be placed into the state treasury and thus be subject to appropriation before use by the college. That case did not rely on or even cite Article IX, Section 9(a). The ruling was based on a historical use of certain funds of the state institutions of higher learning; and based on this historical custom, the court held such funds as received were not "revenue" of the state as meant by the constitutional provisions requiring state revenues to be placed in the treasury.

Accordingly, neither McReynolds nor Thompson apply here. The only case in Missouri that discusses in any detail the board's power to govern the university is State ex rel. Heimberger v. Board of Curators of University of Missouri, 188 S.W. 128 (Mo. Banc 1916). In that case the university challenged the power of the legislature to establish by statute departments in the university. The board contended, based on the predecessor of Article IX, Section 9(a), l.c. 131-132:

> "[9] II. It is insisted the provision in section 5, art. 11, that 'the government of the state university shall be vested in a board of curators' deprives the General Assembly of all power to legislate concerning the university with respect to the establishment of new departments or new courses of study in established departments and, in itself, renders invalid the act of March 23, 1915. Counsel do not mince words. In plain langauge they state their contention to be that the quoted words constitute the board of curators a separate and distinct department of the state government, over which the General Assembly has no power and with which it has practically nothing to do except to make such appropriations as it deems proper under that part of section 5 which deals with appropriations as above pointed out. Upon this phase of the case the argument depends wholly upon the meaning of the word 'government' as it appears in section 5."

The court rejected this broad contention and held the act in question valid.

In doing so, the court, at page 134, citing a provision of the Constitution dealing with appropriations as authority to support the conclusion, stated:

> "Neither at the time of the adoption of the Constitution in 1875 nor since has the state university had any income, independent of appropriations by the General Assembly, which bore any considerable ratio to the sums necessary for its maintenance. It must have been apparent to the framers of the Constitution that if the people adopted the Constitution, the university's development and growth, so far as money was required therefor, would depend upon appropriations from the state treasury. That these appropriations would be under the absolute control of the General Assembly the framers of the Constitution expressly provided. . . ."

There is one additional case which concerned the right of the board to govern the university that also dealt with the validity of a statute which the board contends interfered with this right. Curators of University of Missouri v. Public Service Employees Local No. 45, 520 S.W.2d 54 (Mo.Banc 1975). The statutes involved granted rights of public employees to join labor organizations. The court rejected the contention that such statutes encroached on such right to govern.

In view of these cases, particularly the Heimberger case, it is our opinion that the itemized appropriation suggested by your request would not unconstitutionally encroach upon the board's right to govern the university, particularly in view of the broad power of the General Assembly to control and direct the use of the state's general revenue. In this regard, we observe this view is in keeping with Article IX, Section 9(b) which reads:

> "The general assembly shall adequately maintain the State University and such other educational institutions as it may deem necessary." (Emphasis supplied)

Further, we note that various kinds of line item appropriations have been made to the university in the past. See, for example, Laws of Missouri 1945, page 111; Laws of Missouri 1947, Section 7.010, pages 135-137; and Laws of Missouri 1949, Section 7.010, pages 123-125.

This conclusion is supported by decisions in other states. State ex rel. Black v. State Board of Education, 196 P. 201 (Idaho 1921), dealt with constitutional language more explicit than here, providing the Board of Regents shall have the "control and direction

of all the funds of, and appropriations to, the university." Article IX, Section 10, Constitution of Idaho. The court said as to appropriations, l.c. 205:

> "When an appropriation of public funds is made to the University, the Legislature may impose such conditions and limitations as in its wisdom it may deem proper. If accepted by the regents, it is coupled with the conditions, and can be expended only for the purposes and at the time and in the manner prescribed, and can be withdrawn from the state treasury only as provided by law."

In State ex rel. University of Minnesota v. Chase, 220 N.W. 951 (Minn. 1928), the court applied constitutional language similar to Missouri, stating l.c. 955:

> ". . . At the one extreme, the Legislature has no power to make effective, in the form of law, a mere direction of academic policy or administration. At the other extreme, it has the undoubted right within reason to condition appropriations as it sees fit. . . ."

And, in State Board of Agriculture v. State Administrative Board, 197 N.W. 160 (Mich. 1924), the court stated, l.c. 161, there was a distinction between funds received by way of appropriations and other college funds, and that appropriations may be made upon condition that the money shall be used for a specific purpose or upon any other conditions the legislature can lawfully impose. Thus the court considered the character of the conditions attached to the appropriation in question. The first condition was that the money be used for a specific purpose of carrying on a cooperative agricultural extension program and this condition was upheld. The second condition was that the money be used subject to the general supervisory control of a state board created not by the Constitution but by the legislature. This second condition was held invalid. See also Regents of University of Michigan v. State, 208 N.W.2d 871 (Mich.App. 1973) affirmed in part 235 N.W.2d 1 (Mich. 1975), following the same rule. Finally, we have reviewed State Board of Agriculture v. Fuller, 147 N.W. 529 (Mich. 1914), and find no departure from this rule.

CONCLUSION

Therefore, it is the opinion of this office that the legislature is not prohibited by Article IX, Section 9(a), Constitution of Missouri, when appropriating from general revenue to the Board of Curators for the University of Missouri, from specifying amounts for each campus.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,

John Ashcroft

JOHN ASHCROFT
Attorney General

CONSTITUTIONAL LAW:
UNIVERSITY OF MISSOURI:
GOVERNOR:

Pursuant to Article IV, Section 51, Constitution of Missouri, persons appointed by the Governor to administrative boards and commissions of the state, including persons appointed to the Board of Curators of the University of Missouri, which appointments were made while the Senate was not in session, but which appointments require confirmation by the Senate, cease to hold office after thirty days from the date the Senate next convened, if the Senate fails to act on said appointments and thereby did not give its advice and consent within thirty days after the Senate convened in special or regular session.

OPINION NO. 69

February 15, 1977

FILED
69

Honorable Norman L. Merrell
President Pro Tem of the Senate
Room 423, State Capitol
Jefferson City, Missouri 65101

Dear Senator Merrell:

This is in response to your request for an opinion of this office concerning the following question:

> "Do persons appointed by the Governor to administrative boards and commissions of the state, and in particular persons appointed to the Board of Curators of the University of Missouri, which appointments were made in 1976 while the Senate was not in session, but which appointments require confirmation by the Senate, hold office after thirty days from the date the Senate convened their session, if the Senate fails to act on said appointments and thereby did not give its advice and consent within thirty days after the Senate convened in special or regular session?"

We believe the answer to this question is found in Article IV, Section 51, Constitution of Missouri, which provides as follows:

> "The appointment of all members of administrative boards and commissions and of all

> department and division heads, as provided by law, shall be made by the governor. All members of administrative boards and commissions, all department and division heads and all other officials appointed by the governor shall be made only by and with the advice and consent of the senate. The authority to act of any person whose appointment requires the advice and consent of the senate shall commence, if the senate is in session, upon receiving the advice and consent of the senate. If the senate is not in session, the authority to act shall commence immediately upon appointment by the governor but shall terminate if the advice and consent of the senate is not given within thirty days after the senate has convened in regular or special session. If the senate fails to give its advice and consent to any appointee, that person shall not be reappointed by the governor to the same office or position." (Emphasis supplied)

We think that this explicit language which we have underlined in Section 51 is clear and unambiguous; and, therefore, it is our opinion that persons coming under the situation stated in your opinion request ceased to hold office after thirty days from the convening of the Senate in this session. We have reviewed Article VII, Section 12, Constitution of Missouri, and Section 172.050, RSMo, and find they are inapplicable because they have been superseded by Article IV, Section 51. Accordingly, such persons having ceased to hold office, they cannot in any way act as members of such boards or commissions and are not entitled to any of the prerequisites of said offices. Until new persons take office, it is then also our opinion that such offices are vacant.

CONCLUSION

It is the opinion of this office that pursuant to Article IV, Section 51, Constitution of Missouri, persons appointed by the Governor to administrative boards and commissions of the state, including persons appointed to the Board of Curators of the University of Missouri, which appointments were made while the Senate was not in session, but which appointments required confirmation by the Senate, cease to hold office after thirty days from the date the Senate next convened, if the Senate fails to

act on said appointments and thereby did not give its advice and consent within thirty days after the Senate convened in special or regular session.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

OFFICES OF THE

JOHN ASHCROFT
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

(314) 751-3321

March 1, 1977

OPINION LETTER NO. 72

Mr. Theodore L. Johnson, III
Greene County Counselor
P. O. Box 4302 G.S.
Springfield, Missouri 65804

Dear Mr. Johnson:

This letter is in response to your question asking:

> "Can the Greene County Board of Equalization enter into contractual agreements with the City of Springfield, Missouri, and the R-XII School District of Springfield, Missouri, whereby the Board of Equalization would undertake its statutory duty to equalize assessment in Greene County, Missouri? To this extent the Board of Equalization has no financial ability to provide staff necessary to carry on such affirmative duty under the statutes to equalize assessment. To this extent can Greene County, Missouri, the City of Springfield, and the R-XII School District enter into an agreement to share expenses for the Board of Equalization in carrying out its statutory mandate?"

We believe that our Opinion No. 114, 1969, which is enclosed and is self-explanatory, answers your question. You have indicated that you were of the view that such opinion is distinguishable. It is our view, however, that it is clearly indicated on page 2 of that opinion that, ". . . the St. Joseph School District does not have the authority to enter into a cooperative agreement with the City of St. Joseph and the County of Buchanan in undertaking the reevaluation of real property because it is not 'within the scope of the powers of such municipality and political subdivision,' as required by Section 70.220, RSMo . . ." Therefore, we

expressed our view that the school district could not enter into such contract because it lacked the authority to enter into such a contract.

We conclude that the school district does not have the authority to enter into such a cooperative agreement with Greene County and the City of Springfield, Missouri. Having reached this conclusion, we are of the view that it is unnecessary to determine whether or not Greene County or the City of Springfield has authority to enter into such cooperative agreements.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosure: Op. No. 114
9/23/69, Reed

AGRICULTURE:
CORPORATIONS:
FAMILY FARMS:

A corporation, incorporated for the purpose of farming and the ownership of agricultural land in Missouri, whose shares of voting stock are wholly owned and held by a family farm corporation, as defined by Section 350.010(5), RSMo Supp. 1975, is neither a "family farm corporation" nor an "authorized farm corporation" within the meaning of Section 350.010(2) or (5), respectively. It is our further opinion that the subsidiary corporation referred to above, which owned agricultural land and operated said land as a farm prior to September 28, 1975, may continue to engage in farming and acquire agricultural land in Missouri within the limitations imposed by Section 350.015(3). We are of the further opinion that the subsidiary corporation referred to above must file an annual report, giving the information required by Sections 350.020.1 and 350.020.4, with the Director of the Missouri Department of Agriculture.

OPINION NO. 76

April 20, 1977

FILED
76

Mr. Jack Runyan, Director
Missouri Department of Agriculture
Post Office Box 630
Jefferson City, Missouri 65101

Dear Mr. Runyan:

This is in response to your request for a formal opinion from this office posing the following questions:

> "(1) Is a corporation, incorporated for the purpose of farming and the ownership of agricultural land in Missouri, whose shares of voting stock are wholly owned and held by a family farm corporation, as defined by Section 350.010(5) RSMo Supp. 1975, either an 'authorized farm corporation' or a 'family farm corporation' within the meaning of Section 350.010(2) or (5), respectively.
>
> "(2) If the wholly owned subsidiary corporation referred to in Question 1, above, is not a family farm corporation or an authorized farm corporation, but owned agricultural land and operated said land as a farm prior to September 28, 1975, may it continue to engage

in farming, within the meaning of Sections 350.010(6) and 350.015(3), in Missouri.

"(3) If the wholly owned subsidiary corporation referred to in Questions 1 and 2 above may engage in farming in Missouri, is it required to file reports with the Director of the Missouri Department of Agriculture, purusant to 350.020."

The sections you refer to in your request are part of Chapter 350, RSMo Supp. 1975, enacted in 1975 by the Missouri General Assembly and entitled "An act relating to agricultural lands; regulating the ownership of such land by certain corporations; with penalty provisions." Laws 1975, p. ____, S.C.S.H.C.S.H.B. No. 655, Sections 1-5. Section 350.010(2) and (5) define, for the purposes of the act, an "authorized farm corporation" and "family farm corporation", as follows:

"(2) 'Authorized farm corporation' means a corporation meeting the following standards:

(a) All of its shareholders, other than any estate, or revocable and irrevocable trusts are natural persons;

(b) It must receive two-thirds or more of its total net income from farming as defined in this section;"

* * *

"(5) 'Family farm corporation' means a corporation incorporated for the purpose of farming and the ownership of agricultural land in which at least one-half of the voting stock is held by and at least one-half of the stockholders are members of a family related to each other within the third degree of consanguinity or affinity including the spouses, sons-in-law and daughters-in-law of any such family member according to the rules of the common law, and at least one of whose stockholders is a person residing on or actively operating the farm, and none of whose stockholders are a corporation prohibited by section 350.015 from entering into farming, or any corporation which is subject to

> the controlled expansion provisions of section 350.015; provided that a family farm corporation shall not cease to qualify as such hereunder by reason of any gift, devise or bequest of shares of voting stock. A person actively operating a farm shall include, but not be limited to, a person who has an ownership interest in the family farm corporation and exercises some management control or direction."

The questioned corporation you refer to is a corporation wholly owned by a family farm corporation as defined in Section 350.010 (5). We understand your inquiry to be whether this corporate arrangement qualifies the subsidiary as an authorized or family farm corporation.

In construing statutory language, it is essential to determine the intent and object of the legislature in enacting the statute in question by giving the words used therein their plain, rational and ordinary meaning. DePoortere v. Commercial Credit Corporation, 500 S.W.2d 724 (Mo.Ct.App. at Spr. 1973); United Air Lines, Inc. v. State Tax Commission, 377 S.W.2d 444 (Mo.Banc 1964). Where the language of the statute is plain and unambiguous, the General Assembly is presumed to have intended exactly what is directly stated in the statute. State v. Kraus, 530 S.W.2d 684 (Mo.Banc 1975); State ex rel. Zoological Park Subdistrict of the City and County of St. Louis v. Jordan, 521 S.W.2d 369 (Mo. 1975); State ex rel. State Highway Commission v. Wiggins, 454 S.W.2d 899 (Mo.Banc 1970). Applying these guidelines to Section 350.010(2) and (5), it is clear that the corporation referred to in question 1 can neither qualify as an "authorized farm corporation" nor as a "family farm corporation". The questioned corporation is not an "authorized farm corporation" as none of its shareholders are natural persons. Further, the questioned corporation cannot qualify as a "family farm corporation" as none of its shareholders are "members of a family related to each other within the third degree of consanguinity or affinity including the spouses, sons-in-law and daughters-in-law", and further, not one of its shareholders is a "person residing on or actively operating the farm." Rather, all of the shares of the questioned corporation are owned and held by another corporation and not by natural persons or members of a family.

The direct purpose and object of the Farming Corporations Act is the restriction and regulation of farming and ownership of agricultural land by certain corporations. Had the legislature

intended to allow corporations of the type referred to in your question 1 to engage in farming or own agricultural land, it could have done so. However, the plain meaning of Section 350.010(2) and (5) indicates that either all of the shareholders of the corporation must be natural persons or in the latter case, at least half must be members of a family. Therefore, the subsidiary corporation referred to in your question 1 cannot qualify as an "authorized farm corporation" or "family farm corporation" within the meaning of Section 350.010(2) and (5).

In response to your second question, we refer you to Attorney General's Opinion Letter No. 224, issued December 21, 1976, copy enclosed, in which it was held that Chapter 351, RSMo, relating to formation of corporations, permits incorporation only for "lawful purposes", and therefore, a corporation may not be incorporated for the purpose of engaging in farming or owning agricultural lands unless that corporation meets one of the exceptions outlined in Section 350.015 of the Farming Corporations Act. In his opinion, the Attorney General stated:

> "The law clearly permits incorporation only for 'lawful' purposes. Chapter 350 outlines allowable purposes for corporate farming. Since Section 351.020 allows corporations to be formed only for lawful purposes, any entity which seeks incorporation for any purpose prohibited in Chapter 350 should be denied incorporation. As a result, Section 350.015 prohibits the incorporation of any entity to engage in farming unless that entity meets the exceptions outlined in Section 350.015. Consequently, entities which can come within the exceptions of Section 350.015 should be allowed to incorporate."

It is therefore our opinion that Section 350.015 prohibits any corporation from engaging in farming or owning agricultural land unless that corporation meets one of the exceptions outlined in subsections 1-10 of Section 350.015. Section 350.015 provides:

> "After September 28, 1975, no corporation not already engaged in farming shall engage in farming; nor shall any corporation, directly or indirectly, acquire, or otherwise obtain an interest, whether legal, beneficial or otherwise, in any title to agricultural

land in this state, provided, however, that the restrictions set forth in this section shall not apply to the following:

(1) A bona fide encumbrance taken for purposes of security;

(2) A family farm corporation or an authorized farm corporation as defined in section 350.010;

(3) Agricultural land and land capable of being used for farming owned by a corporation as of September 28, 1975 including the normal expansion of such ownership at a rate not to exceed twenty percent, measured in acres, in any five-year period, or agricultural land and land capable of being used for farming which is leased by a corporation in an amount, measured in acres, not to exceed the acreage under lease to such corporation as of September 28, 1975 and the additional acreage for normal expansion at a rate not to exceed twenty percent in any five-year period, and the additional acreage reasonably necessary whether to be owned or leased by a corporation to meet the requirements of pollution control regulations.

(4) A farm operated wholly for research or experimental purposes, including seed research and experimentation and seed stock production for genetic improvements, provided that any commercial sales from such farm shall be incidental to the research or experimental objectives of the corporation;

(5) Agricultural land operated by a corporation for the purposes of growing nursery plants, vegetables, grain or fruit used exclusively for brewing or winemaking or distilling purposes and not for resale, for forest cropland or for the production of poultry, poultry products, fish or mushroom farming, production of registered breeding stock for sale to farmers to improve their breeding herds, for the production of raw materials

for pharmaceutical manufacture, chemical processing, food additives and related products, and not for resale.

(6) Agricultural land operated by a corporation for the purposes of alfalfa dehydration exclusively and only as to said lands lying within fifteen miles of a dehydrating plant and provided further said crops raised thereon shall be used only for further processing and not for resale in its original form.

(7) Any interest, when acquired by an educational, religious, or charitable not for profit or pro forma corporation or association;

(8) Agricultural land or any interest therein acquired by a corporation other than a family farm corporation or authorized farm corporation, as defined in section 350.010, for immediate or potential use in nonfarming purposes. A corporation may hold such agricultural land in such acreage as may be necessary to its nonfarm business operation; provided, however, that pending the development of agricultural land for nonfarm purposes, such land may not be used for farming except under lease to a family farm unit, a family farm corporation or an authorized farm corporation, or except when controlled through ownership, options, leaseholds, or other agreements by a corporation which has entered into an agreement with the United States of America pursuant to the New Community Act of 1968 (Title IV of the Housing and Urban Development Act of 1968, 42 U.S.C. 3901-3914) as amended, or a subsidiary or assign of such a corporation; or

(9) Agricultural lands acquired by a corporation by process of law or voluntary conveyance in the collection of debts, or by any procedure for the enforcement of a lien or claim thereon, whether created by mortgage or otherwise; provided, that any corporation may hold for ten years real estate acquired

> in payment of a debt, by foreclosure or otherwise, and for such longer period as may be provided by law.
>
> (10) The provisions of sections 350.010 to 350.030 shall not apply to the raising of hybrid hogs in connection with operations designed to improve the quality, characteristics, profit ability, or market ability of hybrid hogs through selective breeding and genetic improvement where the primary purpose of such livestock raising is to produce hybrid hogs to be used by farmers and livestock raisers for the improvement of the quality of their herds."

While subsection (2) allows family farm corporations or authorized farm corporations, as defined in Section 350.010, to engage in farming or own agricultural land after September 28, 1975, we have previously determined that the corporation referred to in your question 1 does not qualify under either of these definitions. Further, we understand from your request that the questioned corporation does not meet any of the exceptions of subsections (1) or (4) through (10) of Section 350.015. However, the facts provided in question 2 indicate that the disputed corporation owned agricultural land and operated the land as a farm prior to September 28, 1975. Applying the facts supplied in your request to Section 350.015(3), it is our opinion that the corporation you refer to may continue to retain ownership in agricultural land it owned as of September 28, 1975; may continue to engage in farming on that land; may expand its ownership of agricultural land at a rate not to exceed twenty percent measured in acres in any five-year period; and may acquire through ownership or lease additional acreage reasonably necessary to meet the requirements of pollution control regulations.

Your third question asks whether the questioned corporation, if engaged in farming, must file reports with the Director of the Missouri Department of Agriculture. Section 350.020.1

> "1. Every corporation engaged in farming or proposing to commence farming in this state after September 28, 1975, shall file with the director of the state department of agriculture a report containing the following information;

> (1) The name of the corporation and its place of incorporation;
>
> (2) The address of the registered office of the corporation in this state, the name and address of its registered agent in this state and, in the case of a foreign corporation, the address of its principal office in its place of incorporation;
>
> (3) The acreage and location listed by section, township and county of each lot or parcel of land in this state owned or leased by the corporation and used for farming, and
>
> (4) The names and addresses of the officers and the members of the board of directors of the corporation."

Further, Section 350.020.4, RSMo Supp. 1975, provides:

> "Every corporation, except a family farm corporation, engaged in farming in this state shall, prior to April fifteenth of each year, file with the director of the state department of agriculture a report containing the information required in subdivision 1 of this section based on its operations in the preceding calendar year and its status at the end of such year."

It is our opinion that the corporation you refer to must file an annual report giving the information required by Sections 350.020.1 and 350.020.4, since it does not qualify as a family farm corporation.

CONCLUSION

It is the opinion of this office that a corporation, incorporated for the purpose of farming and the ownership of agricultural land in Missouri, whose shares of voting stock are wholly owned and held by a family farm corporation, as defined by Section 350.010(5), RSMo Supp. 1975, is neither a "family farm corporation" nor an "authorized farm corporation" within the meaning of Section 350.010(2) or (5), respectively. It is our further opinion that the subsidiary corporation referred to above, which owned agricultural land and operated said land as a farm prior to September 28, 1975, may continue to engage in farming and acquire agricultural land in Missouri within the limitations

imposed by Section 350.015(3). We are of the further opinion that the subsidiary corporation referred to above must file an annual report, giving the information required by Sections 350.020.1 and 350.020.4, with the Director of the Missouri Department of Agriculture.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Enclosure: Op. Ltr. No. 224
12/21/76, Kirkpatrick

JOHN ASHCROFT
ATTORNEY GENERAL

Attorney General of Missouri

JEFFERSON CITY
65101

(314) 751-3321

March 3, 1977

OPINION LETTER NO. 77

Honorable James A. Franklin, Jr.
Prosecuting Attorney
Camden County Courthouse
Camdenton, Missouri 65020

Dear Mr. Franklin:

This letter is in response to your opinion request asking as follows:

> "Under Sections 190.005 to 190.045 RSMO., what is next affirmative action that must be taken by the County Court of Camden County to resolve the matter of the proposed formation of the Cam-Mo Emergency Ambulance District which was initiated by Petition filed in the Office of the County Clerk on July 12, 1976."

You also state:

> "(1) On July 12, 1976, there was presented and filed with the County Clerk of Camden County a petition which proposed the organization of an Ambulance District called the Cam-Mo Emergency Ambulance District.
>
> "(2) Thereafter the petition was presented to the Judges of the County Court of Camden County and the petition was set for hearing on August 16, 1976, which date was not less than thirty (30) nor more than Forty (40) days after the filing of the petition.
>
> "(3) Notice of the hearing was given in accordance with the Statutes.

"(4) Public Hearing was held in the Camden County Courtroom on August 16, 1976, in accordance with the notice.

"(5) No other petition embracing any part of the proposed district was filed prior to the public hearing.

"(6) On August 20, 1976, the Judge [sic] of the County Court found that the petition filed was sufficient and met the requirements of the Statutes and ordered that election be held not less than thirty (30) nor more than ninety (90) days after August 20, 1976, at which time the question of organizing the proposed ambulance district would be put to the voters for determination. It being further ordered that the date of the election would be November 2, 1976.

"(7) Notice of the election was thereafter given and published.

"(8) Election was held on November 2, 1976, the results being One Thousand Third Hundred Sixty Seven (1367) votes 'Yes' and One Thousand Three Hundred Fifteen (1315) votes 'No'.

"(9) On November 10, 1976, the Judges of the County Court did canvass the votes and entered the order declaring the election and organizing the Cam-Mo Ambulance District.

"(10) Thereafter a Notice of Appeal and Petition was filed in the Circuit Court of Camden County. The Notice of Appeal citing Section 49.230, RSMO. and basis of appeal from the November 10, 1976, order of the County Court.

"(11) On February 1, 1977, the matter was brought before Circuit Judge John E. Parrish. His order, a copy of which is attached hereto, wherein he ordered the November 10, 1976, Order of the County Court be set aside and that the County Court be enjoined from organizing the District pursuant to the November 2, 1976, election. The Judge therein also remanded the question back to the County Court of Camden County."

Section 190.030, RSMo Supp. 1975, provides:

> "If the territory, petition and proceedings meet the requirements of sections 190.005 to 190.085, the judges of the county court shall in and by the order finding and determining the sufficiency of the petition and that the territory meets the requirements of sections 190.005 to 190.085 or by a separate order call an election as prayed for in the petition to be held not less than thirty days nor more than ninety days after the entering of the order."

Section 190.035, RSMo Supp. 1975, provides:

> "Notice of the election shall be given by publication on three separate days in one or more newspapers having general circulation within the territory, the first of which publications shall be not less than thirty days prior to the date of the election, and by posting notices in ten of the most public places in the territory, and in case no newspaper has a general circulation in the territory, the notices shall be so posted in fifteen of the most public places therein, not less than thirty days prior to the date of the election. Each notice shall state briefly the purpose of the election, setting forth the proposition to be voted upon, form of ballot to be used at the election, a description of the territory, set forth the election precincts, and designate the polling places therefor. The notice shall further state that any district upon its establishment shall have the powers, objects and purposes provided by sections 190.005 to 190.085, and shall have the power to levy a property tax not to exceed fifteen cents on the one hundred dollars valuation."

Obviously, we do not have the benefit of an intimate knowledge of the legal history of the proceedings involved; and this, coupled with the time limitations which are placed upon us, put us at somewhat of a disadvantage in responding to your question.

Honorable James A. Franklin, Jr.

We note from the copy of the docket sheet of the Circuit Court of Camden County that the court found Section 190.035, RSMo,

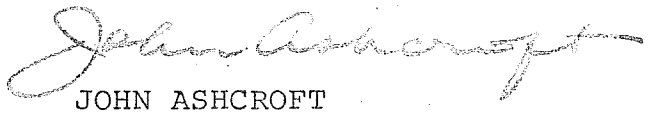
> ". . . was not complied with in that the polling places for the election held November 2, 1976, were not designated by Notice of Election required by said statutes, . . ."

As a result, the circuit court enjoined the county court judges from proceeding with the organization of the ambulance district pursuant to the election held November 2, 1976, and

> ". . . from recognizing said election as having created, formed, or organized such purported ambulance district in any respect. . . ."

It appears to us that the county court should at this time make an amended order pursuant to Section 190.030 containing the findings as provided therein and setting the election as provided therein. The notice of election should then be given as provided in Section 190.035, and a new election held pursuant to said section and Sections 190.040 and 190.045, RSMo Supp. 1975.

Yours very truly,



JOHN ASHCROFT
Attorney General

CARL:
DEPARTMENT OF SOCIAL SERVICES:
DIVISION OF HEALTH:
CRIPPLED CHILDREN:

The method being used by the Division of Health, Missouri Crippled Children's Service, in connection with the supplying of hearing aids and custom-fitted earmolds, as above described, complies with the statutory requirements under Chapter 346, RSMo Supp. 1975.

OPINION NO. 79

June 27, 1977

FILED
79

James L. Sullivan, Director
Department of Consumer Affairs,
Regulation and Licensing
505 Missouri Boulevard
Jefferson City, Missouri 65101

Dear Mr. Sullivan:

This opinion is in answer to the following question:

> Is the method being used by the Missouri Crippled Children's Service for supplying hearing aids and custom-fitted earmolds to crippled children in violation of Chapter 346, RSMo Supp. 1975?

As to the facts, the Division of Professional Registration, Department of Consumer Affairs, Regulation and Licensing, and the Division of Health, Department of Social Services, agree that the Missouri Crippled Children's Service of the Division of Health bid for a supply of hearing aids and custom-fitted earmolds for crippled children. These aids and earmolds are ordered by an associate physician, a board eligible or board certified otologist or otolarynogolist, licensed in Missouri, who is in charge of the management of the child's treatment. Review and final approval for the hearing aid and earmold will continue to be made at the central office level of the Missouri Crippled Children's Service by a staff physician licensed to practice in Missouri. Any modification of the child's custom-fitted earmold or hearing aid will be accomplished in the same manner. At the outset, the crippled children are examined by an audiologist under the supervision of a physician licensed in this state. This physician approves the specifications for the construction of a proper device and earmold. The manufacturer, who has successfully bid for the supply of these items, then produces the hearing aid and custom-fitted earmold to

these specifications and supplies the finished product to the Division of Health, Missouri Crippled Children's Service, for distribution by a physician licensed in Missouri to the child needing the hearing aid and earmold.

Section 346.035.1, RSMo Supp. 1975, says:

> "Sections 346.010 to 346.135 shall not apply to a person who is a physician licensed to practice in Missouri."

As it is stated in this subsection, Chapter 346, RSMo Supp. 1975 does not apply to a person who is a physician licensed to practice in Missouri. The procedure of the Division of Health, Missouri Crippled Children's Service, above described, employs a licensed physician to supervise every stage of the treatment of a child in connection with the transfer of the hearing aid and earmold from the Division to the patient. We believe that such procedure falls within this exemption.

Because the exemption of Section 346.035.1 is applicable, we find it unnecessary to consider whether Chapter 346 otherwise applies to the Missouri Crippled Children's Service.

CONCLUSION

It is the opinion of this office that the method being used by the Division of Health, Missouri Crippled Children's Service, in connection with the supplying of hearing aids and custom-fitted earmolds, as above described, complies with the statutory requirements under Chapter 346, RSMo Supp. 1975.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Terry C. Allen.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

WORKMEN'S COMPENSATION:
COUNTY COLLECTORS:

Employees in the office of county collector of a third class county are county employees for the purposes of workmen's compensation coverage under Chapter 287, RSMo.

OPINION NO. 80

August 17, 1977

Mr. Meredith Ratcliff
Prosecuting Attorney
Adair County
Post Office Box 422
Kirksville, Missouri 63501

Dear Mr. Ratcliff:

This opinion is in response to your request on the following questions.

> "1. Are the employees in a county collector's office employees of the county?
>
> 2. Is it the responsibility of the county to furnish workmen's compensation insurance coverage for those employees in the County Collector's office?
>
> 3. What is the responsibility of the County Collector as to the issue of workmen's compensation coverage for those employees in his office?"

Adair County is a third class county. We understand that the opinion request is made because the workmen's compensation insurer has raised the question as to whether the personnel in the collector's office are county employees.

Section 287.020, RSMo Supp. 1975, of the Missouri Workmen's Compensation Law, provides in part as follows:

> "The word 'employee' as used in this chapter shall be construed to mean every person in the service of any employer, as

> defined in this chapter, under any contract of hire, express or implied, oral or written, or under any appointment or election, including executive officers of corporations. . . ."

A county comes within the definition of employer under Section 287.030.1(2), RSMo Supp. 1975.

The duties, requirements for bond, and certain regulations pertaining to the county collector and deputies are set out in Chapter 52, RSMo. Section 52.300, RSMo, provides that collectors may appoint deputies, may revoke such appointments at their pleasure, may require bonds or other securities from such deputies to secure themselves, and that each deputy shall have like authority to that of the collector to collect taxes levied or assessed within the portion of the county, town, district or city assigned to him. It also provides that each collector shall be responsible to the state, county, towns, cities, districts and individuals, companies, corporations, as the case may be, for all monies collected, and for every act done by any of his deputies while acting as such, and for any omission of duty of such deputy.

Section 52.020, RSMo, provides that in third and fourth class counties the county court may require the county collector to deposit daily all collections of money in the depositaries selected by the county court in accordance with the provisions of Sections 110.130 and 110.150, RSMo.

Section 52.280, RSMo, permits the collector to retain for payment of deputy and clerical hire a sum not to exceed 70% of the maximum amount of fees and commissions which the officer is permitted to retain, but payment for the deputy and clerical hire is payable out of fees and commissions earned and collected by the officer only, and not from general revenue.

In Attorney General Opinion No. 288, April 29, 1970, to Allen S. Parrish, a copy of which is enclosed, the collector, his deputy and clerical hire were considered to be county employees; and payment by the collector of wages to deputy and clerical personnel from the amount the collector is authorized to retain for deputy and clerical hire under Section 52.280 was considered to be payment by the county insofar as social security was concerned. However, the county collector was held not to come within workmen's compensation coverage in Opinion Letter No. 253, October 31, 1974, to A. J. Seier, a copy of which is enclosed.

As in the case of social security, the payment by the collector of wages to deputy and clerical personnel from the amount the collector is authorized to retain for deputy and clerical hire under Section 52.280 would be considered to be payment by the county.

It appears that the conditions of the definition of "employee", quoted above, have been satisfied and that the deputies and clerical hire of the county collector are employees of the county. It is the county collector's responsibility to hire and manage them. Therefore, we believe that the reasoning of Opinion No. 288-1970, above, as it pertains to such deputy collectors or clerical hire, is applicable here.

With regard to your specific questions, it is our opinion that:

(1) The employees in the county collector's office are employees of the county;

(2) Since Adair County is furnishing workmen's compensation coverage by insurance the insurance afforded should cover employees in the county collector's office;

(3) The fixing of responsibility on the county to include the employees in the county collector's office for coverage under the county's workmen's compensation insurance policy renders moot any question of responsibility of the county collector for such insurance for the employees in his office.

When we consider the circumstances that prompted the request for this opinion, it appears important that the workmen's compensation insurer for Adair County be informed of the opinion. Therefore it is suggested that a copy of the opinion be furnished to the insurer. You should require the insurer to acknowledge in writing that employees in the county collector's office are included in the insurance policy for Adair County.

CONCLUSION

It is the opinion of this office that employees in the office of county collector of a third class county are county employees

Mr. Meredith Ratcliff

for the purposes of workmen's compensation coverage under Chapter 287, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Carroll J. McBride.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Enclosures: Op. No. 288
4/29/70, Parish

Op. Ltr. No. 253
10/31/74, Seier

OFFICERS:
COMPENSATION:
COUNTY BUDGET:
COUNTY OFFICERS:
PROSECUTING ATTORNEY:

McDonald County is liable for any unpaid balance due the prosecuting attorney of McDonald County as salary provided for by statute for the years 1975 and 1976 without regard as to whether such salary was budgeted by the county court during such years.

OPINION NO. 83

April 21, 1977

FILED
83

Honorable Abe R. Paul
Prosecuting Attorney
McDonald County Courthouse
Pineville, Missouri 64856

Dear Mr. Paul:

This is in response to a request for an opinion made by you on behalf of the county court of McDonald County as follows:

> "From the current 1977 General Revenue Fund Budget is the County Court of McDonald County, Missouri required to pay past salary for years 1975 and 1976 to County Prosecuting Attorney under provisions 56.285 and 56.291 Revised Statutes for the State of Missouri, which was not requested or budgeted for by the County Prosecuting Attorney?
>
> "On January 3, 1977 the County Clerk of McDonald County received 1977 Budget Estimate from the Prosecuting Attorney for salary of $7,064.70, the county clerk being newly appointed, upon research of the statutory salary of the county prosecuting attorney discovered the salary request included only the salary allowed by 56.280 provision of statutes and questioned the county prosecuting attorney why he had not requested compensation allowed under provisions 56.285 and 56.291 of statutes. The county prosecuting attorney first stated that being newly elected he had used the same salary for 1977 budget request, that had been used the previous years 1975 and 1976 in budget requests, at this point the county clerk asked that the county prosecuting attorney determine if provisions 56.285 and 56.291 should

> be included in 1977 budget request. On January 21, 1977 county prosecuting attorney informed county clerk by memo, with a recent Attorney General's opinion attached that he should have budgeted for the compensation under provisions 56.285 and 56.291, the county clerk agreed and included in 1977 Budget request which was approved by county court. There was no request prior to the approval of the 1977 County Budget for any past salary for years 1975 and 1976; on February 10, 1977 the prosecuting attorney requested by letter on behalf of the estate of his late Father, James L. Paul, and himself as prosecuting attorney past salary due under provisions 56.285 and 56.291 Revised Statutes of the State of Missouri. The amount requested $4,000.00 was to be distributed with $3,340.00 going to estate of former prosecuting attorney for year 1975 and the portion of 1976 prior to his death, the balance of $660.00 to present prosecuting attorney for portion of year 1976 he served by gubernatorial appointment following [the death] of his father."

McDonald County is a third class county.

In your opinion request you refer to the salary to be paid the county prosecuting attorney under the provisions of Sections 56.280, 56.285, and 56.291, RSMo.

In Opinion No. 35 issued by this office on January 20, 1977, to James P. Anderton, we stated that the prosecuting attorney in third and fourth class counties was entitled to compensation as provided for in Section 56.280 and for additional compensation provided for in Sections 56.285 and 56.291. We reaffirm such opinion.

As we understand the position of the county court judges of McDonald County, they do not think they should pay the past salary for 1975 and 1976, which was requested by the prosecuting attorney after the 1977 budget was approved; and they further believe that it is the responsibility of elected officials to figure their own salaries correctly and submit such salary requests in accordance with the provisions of Section 50.540 and that since the request was not budgeted or appropriated in the 1977 budget it should not be paid because it was not budgeted.

Section 50.540 does require county officials in counties of classes three and four to prepare and submit to the budget officer estimates of its requirements for expenditures and estimated revenues for the next budget year on or before the 15th of January, and apparently the county court is of the opinion that the compensation due the prosecuting attorney cannot be paid unless it is budgeted.

In Gill v. Buchanan County, 142 S.W.2d 665 (Mo. 1940), the question involved a county's liability for the past due salary of a county court judge which had not been budgeted by the county court. In discussing the questions before the court in this case, the court stated, l.c. 668-669:

> "Defendant also contends that plaintiff is not entitled to recover because there was not a sufficient amount provided in the 1934 county budget for county court salaries to pay salaries of $4,500 each. (Only $840 more than the total of salaries figures at $3,000 each was included in the salary fund for the county court.) However, as hereinabove noted, salaries of county judges are fixed by the Legislature and the Constitution prevents even the Legislature from changing them during the terms for which they were elected. Surely, the county court cannot change them, by either inadvertently or intentionally providing greater or less amounts in the salary fund in the budget. The action of the Legislature in fixing salaries of county officers is in effect a direction to the county court to include the necessary amounts in the budget. Such statutes are not in conflict with the County Budget Law but must be read and considered with it in construing it. They amount to a mandate to the County Court to budget such amounts. Surely no mere failure to recognize in the budget this annual obligation of the county to pay such salaries could set aside this legislative mandate and prevent the creation of this obligation imposed by proper authority. Certainly such obligations imposed by the Legislature were intended to have priority over other items as to which the county court had discretion to determine whether or not obligations concerning them should be incurred. They must

> be considered to be in the budget every year because the Legislature has put them in and only the Legislature can take them out or take out any part of these amounts. This court has held that the purpose of the County Budget Law was 'to compel * * * county courts to comply with the constitutional provision, section 12, art. 10' by providing 'ways and means for a county to record the obligations incurred and thereby enable it to keep the expenditures within the income.' Traub v. Buchanan County, 341 Mo. 727, 108 S.W.2d 340, 342.
>
> "To properly accomplish that purpose, mandatory obligations imposed by the Legislature and other essential charges should be first budgeted, and then any balance may be appropriated for other purposes as to which there is discretionary power. Failure to budget funds for the full amount of salaries due officers of the county, under the applicable law, which the county court must obey, cannot bar the right to be paid the balance. Instead, it must be the discretionary obligations incurred for other purposes which are invalid, rather than the mandatory obligation imposed by the same authority which imposed the budget requirements. We, therefore, hold that a county court's failure to budget the proper amounts necessary to pay in full all county officers' salaries fixed by the Legislature, does not affect the county's obligation to pay them." (Emphasis supplied)

As heretofore stated, the salary of the prosecuting attorney in third and fourth class counties is determined by the legislature by statute and which amounts to a mandate to the county court to budget such amounts and failure to do so does not prevent the creation of the obligation but it must be considered to be in the budget because the legislature has created the obligation by statute, and such obligations imposed by the legislature have priority over other items as to which the county court has discretion to determine whether or not such obligations should be incurred.

In discussing the other contention made by the county court in this case, the court stated, l.c. 669:

> "Defendant, however, contends that plaintiff should be estopped from enforcing this claim both because he failed to demand payment during the year 1934 'before the income and revenue provided for that year had been fully expended, incumbered or exhausted'; and because he was guilty of a breach of duty (since he was one of the officers charged with the management of the county's financial affairs) in failing to comply with the County Budget Law and in participating in the authorization of expenditures in excess of the revenue provided for the year of 1934. As to the first, we find nothing in the agreed statement of facts about when plaintiff first claimed that he had not been paid his full salary. Nevertheless, this court has consistently held that mere failure to claim the balance at the time is not a proper basis for estoppel in these cases. There are several reasons for this, all based upon the following differences between public office and private employment and the different situation of a municipal corporation or a governmental subdivision of the state from a private person or corporation:
>
> First: Payment of salaries fixed by the Legislature is a duty imposed upon the county by the Legislature, and the county is not entitled to assume that by paying a part of this obligation it has discharged the entire debt.
>
> Second: To permit estoppel in such cases would make it possible for executive or administrative officers to encroach upon and exercise the legislative functions of fixing salaries of other officers and even ignore the action of the Legislature with regard to them. This is against public policy for many reasons." (Emphasis supplied)

As stated above, the failure of the prosecuting attorney to include the total amount of salary due the office does not discharge the obligation or prevent the enforcement of it.

To permit public officers elected or appointed to receive by agreement or otherwise, a less compensation for their services than fixed by law, would be contrary to "public policy" of the state. Reed v. Jackson County, 142 S.W.2d 862 (Mo. 1940).

It is the opinion of this office that under the facts submitted, McDonald County is liable for any unpaid portion of the salary that was due the deceased prosecuting attorney of McDonald County for the years 1975 and 1976 as well as the unpaid salary due the present prosecuting attorney for 1976 and 1977. The fact that it has not been included in the budget does not discharge the obligation; and since the obligation was created by statute, it has to be paid prior to other discretionary items in the budget. The fact that the officer is now deceased does not discharge the obligation which is due and payable to the estate of the deceased.

CONCLUSION

It is the opinion of this office that McDonald County is liable for any unpaid balance due the prosecuting attorney of McDonald County as salary provided for by statute for the years 1975 and 1976 without regard as to whether such salary was budgeted by the county court during such years.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

John Ashcroft

JOHN ASHCROFT
Attorney General

DEPUTIES:
COUNTY TREASURER:

A county court in a third class county is without authority to appoint a deputy county treasurer. A county treasurer in a third class county may appoint a deputy to perform ministerial duties at the expense only of the county treasurer. Signing checks under the provisions of Section 110.240, RSMo 1969, is a ministerial act which may be performed by a deputy county treasurer in the name of the county treasurer whose signature may be affixed by the use of a facsimile signature filed with the Secretary of State.

OPINION NO. 88

July 19, 1977

FILED
88

Honorable Cynthia MacPherson
Prosecuting Attorney
Audrain County Courthouse
Mexico, Missouri 65265

Dear Mrs. MacPherson:

This is in response to your request for an opinion from this office as follows:

> "In situations in which the duty of the county treasurer includes signing documents, e.g. in the regular course of signing checks upon the presentation of warrants pursuant to 110.240, RSMo 1969, and where the county employs a part time deputy county clerk, may documents be executed by use of the facsimile signature of the county treasurer? If the answer to this question is 'yes', should the county treasurer's manual signature be filed with the Secretary of State?
>
> "The county treasurer of Audrain County is Hattie Woods; her part time deputy, employed by the county, is Fay Lowery. Since she has been performing her office as county treasurer, Ms. Woods has occasionally been afflicted with bouts of illness which sometimes prevent her from keeping office hours. Such physical incapacity of the county treasurer, when it occurs, paralyzes the operation of the county court. The deputy county treasurer, Ms. Lowery, is employed by and works part time for the county."

Mrs. Cynthia MacPherson

In a telephone conversation, you informed us that the person referred to in the first paragraph is the deputy county treasurer and not the deputy county clerk.

Audrain County is a third class county not under township organization.

In substance you inquire whether a county treasurer in a third class county has authority to appoint a deputy county treasurer and if so, whether the deputy county treasurer has authority to sign checks which according to Section 110.240, RSMo 1969, are required to be signed by the county treasurer.

There is no statute providing for the appointment of a deputy county treasurer in a third class county.

You state that Fay Lowery has been employed by the county as a deputy county treasurer and is paid by the county for her services.

We are enclosing herewith Opinion No. 96-1954 to Wheeler in which we stated that the county court of a third class county may not appoint a deputy county treasurer. In that opinion we stated that county courts possess only limited jurisdiction and outside of the management of county fiscal affairs possess no powers except those conferred by statute. Since there is no statutory authorization for county courts of the third class county to appoint a deputy county treasurer, we concluded that such courts have no such authority. We did conclude, however, that the county treasurer may appoint a deputy to discharge the clerical duties of the office which power is derived from the common law. We further stated that if the treasurer made the appointment of the deputy, the checks signed by the deputy would be valid. This was on the theory that as a general rule a deputy may perform any ministerial act that his principal is to perform. We affirm the principles of law and conclusion as stated in the above opinion.

We call attention to the fact that the authority of the county treasurer to appoint a deputy to discharge the clerical duties of the office requires only performing clerical or ministerial duties which do not require any discretion of the officer in the performance of such duties. In 67 C.J.S. Officers § 148, the general rule of law regarding the appointment of deputies for public officials is stated as follows:

> "Public power may not be delegated to private persons or corporations, over whom no supervision is maintained, nor may the discharge of the duties of public officers ordinarily be so delegated, and it has been

> held that a public officer may not delegate his official duty to another than a deputy. Moreover, an officer may not delegate to an agent power to do an act required by statute involving judgment and discretion. As a rule, however, public officers may appoint deputies for the discharge of ministerial duties, except where the law requires the duty to be performed by the principal in person."

This rule of law is discussed in State ex rel. Skrainka Const. Co. v. Reber, 126 S.W. 397, 399 (Mo.Banc 1910), as follows:

> ". . . An officer to whom a discretion is intrusted by law cannot delegate to another the exercise of that discretion, but after he has himself exercised the discretion he may, under proper conditions, delegate to another the performance of a ministerial act to evidence the result of his own exercise of the discretion. The clerk cannot pronounce judgment, but he may under direction of the judge make the record evidence of it. In Porter v. Paving Co., 214 Mo. 1, 112 S. W. 235, it was held that the signature of the mayor, which the law required to be subscribed to an ordinance to show that it was approved by him, might, under the mayor's direction, be written by his secretary. We do not mean to say that an officer to whom the performance of even ministerial work is personally intrusted may, under all circumstances, delegate to another the performance of that duty, but we are aiming to draw the distinction in that particular between an official act requiring the exercise of personal discretion or judgment and a mere ministerial act which requires the exercise of no discretion, and to say that whilst the one cannot be delegated the other under certain circumstances may be."

Section 110.240, to which you refer, provides:

> "It shall be the duty of the county treasurer, upon presentation to him of any warrant drawn by the proper authority, if there shall be money enough in the depositary belonging to the fund upon which said warrant

> is drawn and out of which the same is payable, to draw his check as county treasurer upon a county depositary in favor of the legal holder of said warrant, and to take up said warr ant and charge the same to the fund upon which it is drawn; but no county treasurer shall draw any check upon the funds in any depositary unless there is sufficient money belonging to said fund upon which said warrant is drawn to pay the same, and no money belonging to said county shall be paid by any depositary except upon checks of the county treasurer. In case any bonds, coupons or other indebtedness of said county are payable by the terms of the bonds, coupons or other debts at any particular place other than the treasury of the county, nothing contained in this section shall prevent any county court from causing the treasurer to place a sufficient sum at the place where said debts shall be payable, at the time of their maturity, to meet the same."

In State ex rel. Jackson County Library District v. Taylor, 396 S.W.2d 623 (Mo.Banc 1965), it was held that payment of properly authenticated warrants of the county library board by a county treasurer with sufficient funds in the county library fund for payment as provided for under Section 110.240 is a ministerial duty and the performance of this duty may be compelled by mandamus.

It is our opinion that the county court of Audrain County has no authority to appoint a deputy county treasurer. Only the county treasurer may appoint a deputy to perform ministerial duties and is solely responsible for the compensation of such person and any payment made by the county court from public funds is an illegal expenditure. It is our opinion that a deputy county treasurer appointed by the county treasurer may sign checks in the name of the county treasurer under the provisions of Section 110.240. Such act is a ministerial act which does not involve any discretion of the county treasurer.

It is also our opinion that if a deputy signs a check it must be signed in the name of the county treasurer by the deputy in the name of the deputy. See Carter v. Hornback, 40 S.W. 893 (Mo. 1897). It is our opinion that affixing the name of the county treasurer to such check may be done by use of a facsimile signature which should be filed with the Secretary of State as provided for in Sections 105.273 to 105.278, RSMo 1969.

Mrs. Cynthia MacPherson

We enclose Opinion Letter No. 52-1977 to Paul which is self-explanatory.

CONCLUSION

It is the opinion of this office that a county court in a third class county is without authority to appoint a deputy county treasurer. A county treasurer in a third class county may appoint a deputy to perform ministerial duties at the expense only of the county treasurer. Signing checks under the provisions of Section 110.240, RSMo 1969, is a ministerial act which may be performed by a deputy county treasurer in the name of the county treasurer whose signature may be affixed by the use of a facsimile signature filed with the Secretary of State.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

John Ashcroft

JOHN ASHCROFT
Attorney General

Enclosures: Op. No. 96
Wheeler, 10-4-54

Op. Ltr. No. 52
Paul, 1977

ROAD DISTRICTS:
ROADS AND BRIDGES:

The county court of a third class county not under township organization form of government may appoint one road overseer for two common road districts.

OPINION NO. 89

April 28, 1977

FILED
89

Honorable Wayne K. Rieschel
Prosecuting Attorney, Dallas County
Box 389
Buffalo, Missouri 65622

Dear Mr. Rieschel:

This opinion is in answer to your following question:

> "Is the County Court required by Section 231.020 to appoint at least one overseer for each road district established by the County Court in accordance with Section 231.010, or may one overseer serve two road districts by order of the County Court?"

These questions arose from the following fact situaton which you described in your request:

> "Our county court ordered one overseer to serve both our road districts. The South Judge of the county court opposed this move. Many South district road residents have complained to me and the county court that this procedure is not in accordance with law."

Dallas County is a third class county not under township organization form of government. Section 231.020, RSMo, provides as follows:

> "In all counties of classes two, three and four not adopting an alternative form of county government, all road overseers shall be appointed by the county court of the county during the month of February."

The primary question is whether the county court can appoint one road overseer to serve two road districts. We have researched

the statutes of Missouri and find no statutory provision prohibiting the appointment of one road overseer to two road districts in the same county wherein the road overseer is appointed under Section 231.020, RSMo. Thus, we must look to common law principles as to the compatibility of the same person holding essentially two different offices simultaneously.

The Missouri Supreme Court has elaborated on the compatibility of the same person holding two different offices simultaneously. In State ex rel. Walker v. Bus, 36 S.W. 636, 639 (Mo.Banc 1896), as stated by the court, the general rule is:

> ". . . At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two,--some conflict in the duties required of the officers, as where one has some supervision of the others, is required to deal with, control, or assist him. . . ." (Emphasis added)

The same principle was stated in the case of State ex rel. McGaughey v. Grayston, 163 S.W.2d 335, 339-340 (Mo.Banc 1942):

> ". . . The settled rule of the common law prohibiting a public officer from holding two incompatible offices at the same time has never been questioned. The respective functions and duties of the particular offices and their exercise with a view to the public interest furnish the basis of determination in each case. Cases have turned on the question whether such duties are inconsistent, antagonistic, repugnant or conflicting as where, for example, one office is subordinate or accountable to the other.
>
> "The rule against holding incompatible offices is founded upon principles of public policy. . . ."

In Attorney General Opinion No. 12 issued January 24, 1941, this office was of the opinion that a person may hold both the office of county surveyor and road overseer at the same time. The common law principles as previously described were applied

in absence of the statutory prohibition. Again, the main consideration was to ascertain whether there was an incompatibility between the two offices.

In examining statutory duties of road overseers in counties of the third and fourth class not adopting an alternative form of county government, it is apparent that the road overseer makes monthly reports to the county highway engineer or to the county clerks in counties that have no highway engineer. Section 231.050, RSMo. He is required to make detailed reports to and a settlement with the county court. Section 231.060, RSMo. He is required to keep roads in repair in the road district as funds permit while at all times conforming to the plan, specification, and instructions of the county highway engineer for the character of the work in question. Section 231.070, RSMo. Even where the overseer is authorized to contract for ditching and draining, he must obtain approval from the county highway engineer prior to authorizing a contract with any owner of land adjacent to the line of the public road for the purpose of opening a ditch or ditches for the drainage of the road or to procure any necessary material for road purposes and to pay reasonable compensation therefor. Section 231.080, RSMo.

The point of this discussion is that the road overseer's duties in two districts in the same county would not be incompatible inasmuch as no overseer has any control or supervision over any other overseer in the county.

It is further significant that prior to 1945 Section 231.020 read in part as follows:

> "All road overseers shall be appointed by the county court of the county at the February term of said court. No person shall be eligible to the office of road overseer, except he be a citizen of the road district . . ." (Emphasis added) (Section 8516, RSMo 1939)

There is no such requirement currently under Section 231.020. However, in road districts within township organizations under Section 231.170, RSMo, the language clearly requires that the person appointed to the office of road overseer shall be a citizen of the township from which he is appointed. Changes in Section 231.020 as a result of the amendment in 1945 manifests the legislative intent not to require a road overseer to be a citizen of the road district for which he may be appointed.

Furthermore, we find nothing in Sections 231.010 through 231.140, RSMo, which would prohibit the county court from appointing the same overseer for two road districts in counties of classes two, three, and four not adopting an alternative form of county government.

CONCLUSION

It is the opinion of this office that the county court of a third class county not under township organization form of government may appoint one road overseer for two common road districts.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Terry C. Allen.

Yours very truly,

John Ashcroft

JOHN ASHCROFT
Attorney General

Enclosure: Op. No. 12
Brown, 1-24-41

INSURANCE: Under Section 375.791, RSMo 1969, the Director of the Division of Insurance of the state of Missouri is not authorized to issue a certificate of authority to Lloyds, New York.

OPINION NO. 91

June 27, 1977

FILED
91

Mr. James L. Sullivan, Director
Department of Consumer Affairs,
Regulation, and Licensing
505 Missouri Boulevard
Jefferson City, Missouri 65101

Dear Mr. Sullivan:

This opinion is in response to the question you asked as follows:

> "'Lloyd's, New York', (hereinafter referred to as 'Applicant'), an aggregation of individual underwriters having its principal office in New York, New York, has filed an application (Exhibit 1) with the Missouri Division of Insurance for a certificate of authority which would authorize and empower the applicant to transact fire, allied lines and marine insurance in the State of Missouri.
>
> "Please favor us with an opinion advising whether the Director is authorized by law to issue a certificate of authority to said 'Lloyd's, New York' under Sections 375.791 to 375.831, RSMo 1969.
>
> "If the answer to the above interrogatory is affirmative, please advise what kind or kinds of business said 'Lloyd's, New York' may be authorized to write in the State of Missouri."

Your opinion request further notes:

> "Applicant was organized in the State of New York in 1892. It is authorized to write in its domiciliary state fire and

> allied lines, inland and ocean marine and auto physical damage insurance, which are the same lines of authority requested to be written in Missouri with the exception of auto physical damage. Applicant is currently licensed to transact the business of insurance in the following states: Alabama, Arizona, Arkansas, California, Florida, Georgia, Illinois, Kentucky, Louisiana, Mississippi, New Mexico, New York, North Carolina, South Carolina, Tennessee, and Texas."

The insurance laws of the state of New York state:

Article 12, Section 425, paragraph 1:

> "Within the meaning of this chapter the term 'Lloyds underwriters' shall mean any aggregation of individuals, who under a common name engage in the business of insurance for profit through an attorney-in-fact having authority to obligate the underwriters severally, within such limits as may be lawfully specified in the power of attorney, on contracts of insurance made or issued by such attorney-in-fact, in the name of such aggregation of individuals, to and with any person or persons insured."

Article 12, Section 425, paragraph 3:

> "Except as the context otherwise requires, every such Lloyds underwriters shall be subject to all of the provisions of this chapter [Article 7] which are applicable to reciprocal insurers."

Article 12, Section 425, paragraph 4:

> "No Lloyds underwriters shall hereafter be organized in this state and no foreign or alien Lloyds underwriters shall be licensed to do an insurance business in this state."

Applicable Missouri statutes are:

Section 375.786, RSMo Supp. 1975 states in part:

> "1. It shall be unlawful for any insurance company to transact insurance business in this state, . . . without a certificate of authority from the director; . . ."

Section 375.791, RSMo 1969, provides:

> "1. Upon complying with the provisions of this chapter, a foreign insurance company organized under the laws of any state of the United States other than this state or the laws of any foreign government as a stock company, mutual company, assessment life company, reciprocal, fraternal benefit society may be admitted to transact in this state the kind or kinds of business which a domestic company similarly organized may be authorized to transact under the laws of this state.
>
> "2. No insurance company shall transact any business in this state on an admitted basis without first obtaining a certificate of authority issued by the superintendent of insurance as provided for in this chapter." (Emphasis added)

It is significant to note that Article 12, Section 425, paragraph 3, of the New York insurance laws was enacted in 1939. Apparently, this paragraph grandfathered in the then existing Lloyds underwriters associations providing that the insurance laws of the state of New York applicable to reciprocal insurers shall control the activities of the Lloyds association in that state.

In your opinion request, the paramount issue is whether the Director of Insurance under Section 375.791 is authorized to issue a certificate of authority to the applicant, a Lloyds association of the state of New York. It is clear from a reading of this section that there is no specific mention of a Lloyds association. This statute was enacted in 1967.

The basic rule of statutory construction is to ascertain the intention of the lawmakers from the words used, if possible, ascribing to the language its plain meaning, and to effectuate the intent found. In this case, upon complying with the provisions of the Missouri insurance laws, a foreign corporation organized under the laws of another state as a stock company, a mutual company, assessment life company, reciprocal, or fraternal benefit society may be permitted to do business in this state of the same kind as

a domestic insurance company similarly organized under the laws of Missouri. It is our view that the types of foreign insurers which may be qualified to do business in this state under this section are specifically enumerated. The language of the statute is, therefore, mandatory in that the specific mention of certain types of insurance companies is to the exclusion of those which are not mentioned under the principle of expressio unius exclusio alterius. 82 C.J.S. Statutes § 333.

We do not believe that the provisions of Article 12 of the insurance laws of New York, Section 425, paragraph 3, makes the Lloyds association a reciprocal for the purposes of Missouri law. To reason otherwise would be to ignore the specific language of Section 375.791.

CONCLUSION

It is the opinion of this office that under Section 375.791, RSMo 1969, the Director of the Division of Insurance of the state of Missouri is not authorized to issue a certificate of authority to Lloyds, New York.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Terry C. Allen.

Yours very truly,

John Ashcroft

JOHN ASHCROFT
Attorney General

LEGISLATORS:
GENERAL ASSEMBLY:

The General Assembly may authorize the use of a state owned or leased automobile by a member of the General Assembly for official use.

OPINION NO. 92

May 10, 1977

Honorable Howard M. Garrett
State Representative, District 124
Room 315, State Capitol Building
Jefferson City, Missouri 65101

Honorable Marvin Proffer
State Representative, District 155
Room 304, State Capitol Building
Jefferson City, Missouri 65101

Gentlemen:

This opinion is in response to your request asking as follows:

> "We refer you to Section 21.140, RSMo Supp. 1975 and Article III, Section 34, Page 35 of the Constitution of the State of Missouri. Is it permissible for a member of the General Assembly to be furnished an automobile at the expense of the State of Missouri?"

Section 21.140, RSMo Supp. 1975, to which you refer, provides the amount of salary senators and representatives shall receive and also provides that such senators and representatives shall receive a weekly mileage allowance, as provided by law for state employees, in going to their place of meeting in Jefferson City from their place of residence, and returning from their place of meeting in Jefferson City to their place of residence while the legislature is in session.

Article III, Section 34 of the Constitution, to which you refer, provides that no senator or representative shall receive any compensation in addition to his salary as a member of the General Assembly for any services rendered in connection with the revision of the general laws made at least every ten years beginning in 1949.

We are of the view that the furnishing of an automobile to a member of the General Assembly for official use does not constitute providing additional compensation. Further, we consider the provisions of Section 21.140, with respect to mileage allowances to and from the place of meeting in Jefferson City and the place of residence while the legislature is in session, to be exclusive and to prohibit the furnishing of a state automobile for the sole purpose of such travel. However, that section does not prohibit the use of a state automobile in traveling to and from such place of meeting to the place of residence where such travel is merely incidental to other official travel. Obviously, where there is no mileage incurred under Section 21.140, no allowance can be claimed because the allowance is made on the basis of reimbursement to legislators for actual mileage on the most usual route.

Neither these provisions nor any other section which we are able to locate prohibits the General Assembly from authorizing the furnishing of an automobile for the use of a member at the expense of the State of Missouri for official purposes only.

CONCLUSION

It is the opinion of this office that the General Assembly may authorize the use of a state owned or leased automobile by a member of the General Assembly for official use.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

SCHOOLS:
STATE AID: A teachers' meeting held on the first day of a school term is to be considered a day of school operation in determining state aid under Section 163.021, RSMo Supp. 1975.

OPINION NO. 93

June 28, 1977

FILED
93

Dr. Arthur L. Mallory
Commissioner, Department of Elementary
and Secondary Education
Post Office Box 480
Jefferson City, Missouri 65101

Dear Dr. Mallory:

This opinion is in response to your question asking as follows:

> "May a board of education schedule a teachers' meeting as the first day of a term and count that day as a part of the one hundred eighty day term required for the district to be eligible for state aid? To put the question another way, how should the term 'dismiss school' be construed?

You also state:

> "Section 163.021(1) authorizes school boards to dismiss school to permit teachers to attend teachers' meetings. Many times we are asked if faculty meetings held prior to the first day pupils will attend in a term can be considered in arriving at the minimum one hundred eighty day term required by this statute in order for a district to qualify for state aid."

Section 163.021, RSMo Supp. 1975, provides in pertinent part as follows:

> "A school district shall receive state aid for its educational program only if it:

> (1) Operates its schools for a minimum of one hundred eighty days, as defined in section 160.011, RSMo, [sic] for each pupil or group of pupils. The term or terms may include legal school holidays as defined in section 171.051, RSMo, and days when the school is dismissed by order of the board to permit teachers to attend teachers' meetings;"

Under Section 171.031, RSMo Supp. 1975, each board of education is given authority to prepare annually a calendar of the school term specifying the opening date of school. Since the board of education has authority to designate the beginning of the term, it follows in our view, that the board may accordingly designate the beginning of the term and then hold a teachers' meeting in accordance with Section 163.021.

We realize that an argument can be made that Section 163.021 speaks in terms of ". . . days when the school is dismissed by order of the board to permit teachers to attend teachers' meetings;" (emphasis added). However, we believe that in reading Section 163.021 in conjunction with Section 171.031, the legislative intent is to authorize the inclusion of days on which teachers' meetings are permitted during what would otherwise be days when pupils actually attend school during the school term set by the board.

CONCLUSION

It is the opinion of this office that a teachers' meeting held on the first day of a school term is to be considered a day of school operation in determining state aid under Section 163.021, RSMo Supp. 1975.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

MEDICAL EXAMINERS:
OSTEOPATHS:
DOCTORS:

The term "physician" as used in Section 58.705, RSMo Supp. 1975, refers only to physicians licensed under Chapter 334, RSMo.

OPINION NO. 97

May 11, 1977

FILED
97

Honorable Russell G. Brockfeld
State Representative, District 108
Room 204, State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Brockfeld:

This opinion is in response to your question asking as follows:

> "Who may serve as a Medical Examiner under the provisions of Section 58.705 RSMo Supp. 1975? Does this section refer only to M.D.'s and D.O.'s or does it also allow persons licensed by other boards dealing with the healing arts, such as the Board of Chiropractic Examiners, Dental Board, Board of Optometry, Board of Podiatry and Board of Nursing to serve as county medical examiners?"

The section to which you refer, Section 58.705, RSMo Supp. 1975, provides in part:

> "1. The county medical examiner shall be a physician duly licensed to practice by the state board of the healing arts. . . ."

Your question may therefore be answered by determining those persons who, in accordance with the requirements of the above-quoted section, are licensed by the State Board of Registration for the Healing Arts as physicians.

The requirements for licensure by this Board as physicians and surgeons are set out in Chapter 334, RSMo. To receive such a license, a candidate must make application to the Board and must meet the qualifications enumerated in Section 334.031,

which include, inter alia, a specified preprofessional education and graduation from a reputable medical or osteopathic college. The candidate must also take and pass an examination administered by the Board, Section 334,040, RSMo, unless this examination is waived in accordance with the reciprocity provisions outlined in Section 334.043. Upon compliance with the foregoing, the applicant is granted a certificate of registration or license, Section 334.070, RSMo.

No other person is granted a license as a physician or surgeon under this chapter, whether he or she holds himself out as a member of one of the professions listed in your question and is lawfully practicing as such, or is a lay person.

Therefore, only those persons licensed as physicians by the State Board of Registration for the Healing Arts are eligible to hold the office of county medical examiners.

CONCLUSION

It is the opinion of this office that the term "physician" as used in Section 58.705, RSMo Supp. 1975, refers only to physicians licensed under Chapter 334, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Lucia Leggette.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

CITIES, TOWNS & VILLAGES:
FOURTH CLASS CITIES:
POOR PERSONS:

A city of the fourth class has the authority to provide for the relief of its poor inhabitants.

OPINION NO. 98

May 25, 1977

FILED
98

Honorable Walt Mueller
State Representative, District 93
Room 102, State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Mueller:

This opinion is in response to your question asking:

> "Can a Fourth Class City set up and administer a program of grants based on specific criteria for low-income individuals whose utility bills are extremely high or can such a municipality fund the administration of such a program by some other public agency?"

You further state:

> "The City of Valley Park is considering the institution of a program to provide funds for low income citizens who are faced with extremely high utility bills."

In 17 McQuillin, Municipal Corporations § 47.06, it is stated:

> "A municipal corporation is under no legal obligation to aid and support its poor [in the absence of a statutory mandate] but it may do so without express legislative authority. And the obligation has been strongly urged by Mulkey, J. of Illinois: 'It is the unquestioned right and imperative duty of every enlightened government in its character of parens patriae to protect and provide for the comfort and well being of such of its citizens as, by reason of infancy, defective understanding, or other misfortune or infirmity, are unable to take care of themselves. The

> performance of this duty is justly regarded as one of the most important of governmental functions and all constitutional limitations must be so understood and construed as not to interfere with its legitimate exercise.' . . ."

In our Opinion No. 8, dated January 13, 1970, to Becker, (copy enclosed) this office concluded that a city has the authority to assume responsibility for the medical expenses of an indigent prisoner under the statutes empowering it to provide for health and welfare. In reaching that conclusion we relied upon the holding in the case of Jennings v. City of St. Louis, 58 S.W.2d 979 (Mo.Banc 1933).

We believe that holding is applicable here and conclude that a city of the fourth class has the authority to provide relief for its poor. See Section 79.470, RSMo.

The question has been raised as to whether or not such action on the part of the city would violate Section 25 of Article VI of the Missouri Constitution which prohibits counties, cities or other political corporations or subdivisions of the state from lending credit or granting money or property to private individuals. We do not consider this provision as a prohibition against the use of funds for public purposes.

In reaching this conclusion, we recognize that any reasonable doubt concerning the existence of a municipal power is to be resolved against the municipality. City of Maryville v. Farmers' Trust Co. of Maryville, 45 S.W.2d 103 (K.C.Mo.App. 1941). We believe, however, that Jennings v. City of St. Louis, supra, removed any reasonable doubt with respect to the powers of cities generally to provide for the relief of their poor. Of course, the City of St. Louis is a charter city and is also a county. However, the holding of the court with respect to all cities generally is clear.

We conclude then that a fourth class city has authority to provide for the relief of the poor inhabitants of the city.

We do not purport to pass upon the particular program or method of providing such relief. Further, we do not answer the latter part of your question with respect to whether or not a municipality can fund the administration of such a program by some other public agency because we have not been provided with sufficient facts concerning that aspect of your question and any answer we might give would be unduly speculative.

CONCLUSION

It is the opinion of this office that a city of the fourth class has the authority to provide for the relief of its poor inhabitants.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Enclosure: Op. No. 8
1/13/70, Becker

GOVERNOR:
CRIMINAL LAW:
PARDON & PAROLES:
CRIMINAL PROCEDURE:

A governor's unconditional pardon of a person convicted of a crime does not operate to expunge the records pertaining to such person. Nor do §§ 610.100 and 610.105, RSMo Supp. 1975, require or authorize the expungement of such records.

OPINION NO. 101

September 28, 1977

FILED
101

Honorable John Wm. Buechner
State Representative, 94th District
Room 108, Capitol Building
Jefferson City, Missouri 65101

Dear Representative Buechner:

This official opinion is being issued in response to your recent request for a ruling concerning the effect of a governor's pardon on the records relating to the pardoned offense. Specifically, you ask the two following questions:

> "1. Does Missouri law provide for the expungement of Magistrate Court records where a governor's pardon has been granted?
>
> "2. Specifically, do §§ 610.100 and 610.105, RSMo Supp. 1975, operate to automatically expunge court records where an individual has been convicted on a guilty plea, served his sentence and then been granted a governor's pardon?"

You go on to explain that a citizen of Missouri, who now resides in your district, was granted a pardon by former Governor Christopher Bond and wishes to have the court records of his conviction expunged. These records, you explain, are in the possession of a St. Louis County magistrate judge and you ask whether there is any statutory authority which would authorize the expungement of these records.

The governor's power to pardon is derived from Article IV, § 7, Constitution of Missouri, which reads, in pertinent part, as follows:

> "The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to provisions of law as to the manner of applying for pardons. . . ."

The governor's pardoning power also is statutorily codified in § 549.010, RSMo 1969, which provides:

> "In all cases in which the governor is authorized by the constitution to grant pardons, he may grant the same, with such conditions and under such restrictions as he may think proper."

As a reading of both Article IV, § 7, and § 549.010 readily reveals, a governor is free to place limitations or restrictions upon any part he elects to grant, provided these conditions are not "illegal, immoral, or impossible of performance. . . ." Ex parte Webbe, 322 Mo. 859, 30 S.W.2d 612, 615 (Mo.Banc 1929). However, for purposes of your questions and this opinion it will be assumed that the pardon referred to was an unrestricted and unconditional pardon.

The power to pardon has been traditionally described by the courts of this state "as a power to exempt individuals from punishment which the law inflicts for crimes committed." Theodoro v. Department of Liquor Control, 527 S.W.2d 350, 353 (Mo.Banc 1975). Consequently, § 222.030, RSMo, provides that where a person, because of a criminal conviction, is "disqualified to be sworn as a juror in any cause, or to vote at any election, or to hold any office of honor, profit or trust within this state," an unconditional pardon will restore such rights. The effect of an unconditional pardon was further spelled out in Guastello v. Department of Liquor Control, 536 S.W.2d 21 (Mo.Banc 1976). In Guastello, the court held that an unconditional pardon obliterates "the fact of conviction" but not the underlying guilt. Thus, if an individual is statutorily disqualified from holding a particular occupation based solely on the fact of conviction, a full pardon will restore the eligibility of the offender. On the other hand, if good character (requiring an absence of guilt) is a necessary qualification, the offender is not automatically once again qualified, merely as a result of the pardon. Guastello v. Department of Liquor Control, supra at 23-25.

Prior to Guastello v. Department of Liquor Control, supra, records of pardoned convictions were routinely used to support the application of the Habitual Criminal Act, § 556.280, RSMo 1969, a practice which repeatedly had been sanctioned by the Missouri Supreme Court. State v. Durham, 418 S.W.2d 23, 27 (Mo. 1967); State ex rel. Stewart v. Blair, 356 Mo. 790, 203 S.W.2d 716, 719 (Mo.Banc 1947); State v. Asher, 246 S.W. 911, 912-914 (Mo. 1922). These decisions were, however, overruled by Guastello, which concluded that since a gubernatorial pardon "obliterated" the fact of conviction, "such 'obliterated conviction' could not be used as the basis for subjecting [a] defendant to the Habitual Criminal Act if he later committed a criminal offense." Guastello v. Department of Liquor Control, supra at 25. Nevertheless, Guastello did not hold that an unconditional gubernatorial pardon "obliterated" the records of conviction. Obviously, if the records of conviction, as well as the fact of conviction, were wiped out and obliterated by a gubernatorial pardon, such an action would have the effect of wiping out both the conviction and the guilt, and the offender would be treated "as if he had not committed the offense in the first place." This interpretation of a governor's pardon was expressly rejected in the Guastello opinion. See Guastello v. Department of Liquor Control, supra at 23.

It is also clear that none of the provisions of Missouri's Sunshine Law dealing with arrest records requires or authorizes the expungement of records of arrest or conviction for an offense which is later "obliterated" by a governor's pardon. In your opinion request, you specifically mentioned §§ 610.100 and 610.105, RSMo Supp. 1975. The former of these two sections reads as follows:

> "If any person is arrested and not charged with an offense against the law within thirty days of his arrest, all records of the arrest and of any detention or confinement incident thereto shall thereafter be closed records to all persons except the person arrested. If there is no conviction within one year after the records are closed, all records of the arrest and of any detention or confinement incident thereto shall be expunged in any city or county having a population of five hundred thousand or more."

The other section to which you make reference, § 610.105, reads as follows:

> "If the person arrested is charged but the case is subsequently nolle prossed, dismissed or the accused is found not guilty in the court in which the action is prosecuted, official records pertaining to the case shall thereafter be closed records to all persons except the person arrested or charged."

Clearly, § 610.100 is applicable only in situations where an individual is arrested, but never charged with an offense; in such instances, and after the passage of the requisite amount of time, this section provides that the records are to be "expunged".[1] In the event a person is, in fact, charged but the case is subsequently "nolle prossed, dismissed, or the accused is found not guilty", § 610.105 requires that the "official records pertaining to the case" be "closed records".[2] Since an individual obviously would have had to have been "charged" with an offense before he could have been convicted of it, it is clear that a person who has been convicted and then pardoned could not fall within the purview of § 610.100, which applies only where the person is arrested but never charged. Likewise, since a gubernatorial pardon is not a nolle prosequi, a dismissal or a finding of not guilty "in the court in which the action is prosecuted," § 610.105 also would not apply to the records of a pardoned conviction.

It is, therefore, our opinion that while a governor's unconditional pardon operates to "obliterate" the fact of conviction, and to restore the individual's civil liberties, it does not operate to expunge the records of conviction or the detention incident thereto.

Since your opinion request specifically concerns the power of a magistrate court to expunge records relating to a pardoned conviction, we do not consider the question of whether a circuit court, pursuant to its general equity powers, has the authority to order the expungement of such records. In Opinion No. 188, issued October 15, 1975, to J. Anthony Dill, we noted that circuit courts occasionally have utilized their equity powers to

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1. Note that this requirement is applicable only in cities or counties having a population of 500,000 or more.

2. For the distinction between "closed records" and records required to be "expunged", see Opinion No. 299, issued September 28, 1973, to Theodore D. McNeal, and see also, State ex rel. M. B. v. Brown, 532 S.W.2d 893, 896 (Mo.Ct.App. at S.L. 1976).

order the expungement of arrest records in particular instances. The validity of such a practice is somewhat questionable. See Cissell v. Brostron, 395 S.W.2d 322, 325 (St.L.Ct.App. 1965). In any event, it is clear that magistrate courts possess no such powers since magistrate courts have no equity jurisdiction. Bridge Development Co. v. Vurro, 519 S.W.2d 321, 325 (Mo.Ct.App. at St.L. 1975); § 482.100(2), RSMo 1969.

Moreover, although you suggest in your opinion request that, if necessary, legislation should be introduced to insure expungement of the records of a pardoned conviction, the complete expungement of such records would, in many cases, be constitutionally prohibited. For example, if the pardoned individual had previously appealed his conviction to the Court of Appeals or to the Supreme Court, Article V, § 12 of the Constitution of Missouri requires that the court's opinion "shall be in writing and filed in the respective causes, and shall become a part of the records of the court and be free for publication." Pursuant to § 477.231, RSMo 1969, and an order entered by the Missouri Supreme Court, en banc, on November 12, 1956, the opinions of the Missouri appellate courts are officially reported in published volumes of the Southwestern Reporter, copies of which are disseminated to attorneys and law libraries throughout the United States. Consequently, in instances where the expunged conviction has been the subject of an appeal, the expungement of all of the records of that conviction would not only be practically impossible but also unconstitutional. See also, Opinion No. 109, issued March 25, 1974, to A. J. Seier.

CONCLUSION

It is, therefore, the opinion of this office that a governor's unconditional pardon of a person convicted of a crime does not operate to expunge the records pertaining to such person. Nor do §§ 610.100 or 610.105, RSMo Supp. 1975, require or authorize the expungement of such records.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Philip M. Koppe.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosures: Op. No. 299, 9-28-73, McNeal
Op. No. 109, 3-25-74, Seier

SCHOOLS:
SCHOOL DISTRICTS: The public school districts in this state may not use funds available to them under Part B of Title IV of the Elementary and Secondary Education Act of 1965 to provide the services described therein to nonpublic school children on nonpublic school premises. The Department of Elementary and Secondary Education may not provide assurances pursuant to Section 403(a)(3) of Title IV (20 U.S.C. § 1803(a)(3)) that Title IV funds will be used to benefit children attending nonpublic schools as required by Section 406 (20 U.S.C. § 1806).

OPINION NO. 102

May 16, 1977

FILED
102

Dr. Arthur L. Mallory
Commissioner of Education
Department of Elementary and
Secondary Education
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Dr. Mallory:

This opinion is issued in response to your request for an official ruling on the following questions:

"I. May the public school districts of Missouri use funds available to them under Part B of Title IV of the Elementary and Secondary Education Act of 1965, as amended by P.L. 93-380, to provide each of the following services to children attending nonpublic schools;

(1) the loaning of library resources, including library books and other printed and published materials;

(2) the loaning of textbooks;

(3) the loaning of instructional equipment and other instructional materials;

(4) the provision of guidance counseling and testing services and materials, which may include personal services.

II. May the Department of Elementary and Secondary Education provide, in its Annual Program Plan for Title IV, the assurance that the public school districts will comply with the requirements of Section 406 of Title IV, relating to the participation of pupils and teachers in nonpublic elementary and secondary schools in all the services under Part B of the Act, as required by Section 403(a)(3) of Title IV."

You have further stated that the use of the material and services in Question I would take place on nonpublic school premises, and this opinion is based on those circumstances.

I

The federal program providing financial assistance to local educational agencies for libraries and learning resources (Part B, Title IV, ESEA of 1965) is found in 20 U.S.C. §§ 1801 through 1821. The statutory scheme for the disbursement of such federal financial assistance provides, in pertinent part, for lump sum grants to the several state educational agencies based roughly on the school age population within the state (Section 1802(b)). Each state educational agency desiring to receive grants must, with the aid of a state advisory council, submit a plan outlining its program for distribution of the allotment to local educational agencies (generally school districts which actually expend the funds) according to their enrollment on an equitable basis, with special emphasis, however, on financially deserving agencies (Section 1803). The purposes for which the grant is made include the acquisition of school library resources, textbooks, and other printed and published instructional material; the acquisition of instructional equipment; testing services and materials and guidance counseling services, which may include personal services (Section 1821(a)).

Section 1806 provides:

"Participation of children enrolled in private schools--Secular, neutral, and nonideological services, materials, and equipment and other arrangements for benefit of children in private schools

"(a) To the extent consistent with the number of children in the school district of a

local educational agency (which is a recipient of funds under this subchapter or which serves the area in which a program or project assisted under this subchapter is located) who are enrolled in private nonprofit elementary and secondary schools, such agency, after consultation with the appropriate private school officials, shall provide for the benefit of such children in such schools secular, neutral, and nonideological services, materials, and equipment including the repair, minor remodeling, or construction of public school facilities as may be necessary for their provision (consistent with subsection (c) of this section), or, if such services, materials, and equipment are not feasible or necessary in one or more such private schools as determined by the local educational agency after consultation with the appropriate private school officials, shall provide such other arrangements as will assure equitable participation of such children in the purposes and benefits of this subchapter.

Equal expenditures

"(b) Expenditures for programs pursuant to subsection (a) of this section shall be equal (consistent with the number of children to be served) to expenditures for programs for children enrolled in the public schools of the local educational agency, taking into account the needs of the individual children and other factors (pursuant to criteria supplied by the Commissioner) which relate to such expenditures, and when funds available to a local educational agency under this subchapter are used to concentrate programs or projects on a particular group, attendance area, or grade or age level, children enrolled in private schools who are included within the group, attendance areas, or grade or age level selected for such concentration shall, after consultation with the appropriate private school officials, be assured equitable participation in the purposes and benefits of such programs or projects.

Administration

"(c)(1) The control of funds provided under this subchapter and title to materials, equipment, and property repaired, remodeled or constructed therewith shall be in a public agency for the uses and purposes provided in this subchapter, and a public agency shall administer such funds and property.

"(2) The provision of services pursuant to this section shall be provided by employees of a public agency or through contract by such public agency with a person, an association, agency, or corporation who or which in the provision of such services is independent of such private school and of any religious organization, and such employment or contract shall be under the control and supervision of such public agency, and the funds provided under this subchapter shall not be commingled with State or local funds.

Waiver of requirement of State participation

"(d) If a State is prohibited by law from providing for the participation in programs of children enrolled in private elementary and secondary schools, as required by this section, the Commissioner may waive such requirement and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of this section.

Arrangements for services where State agency fails to provide for participation on equitable basis

"(e) If the Commissioner determines that a State or a local educational agency has substantially failed to provide for the participation on an equitable basis of children enrolled in private elementary and secondary schools as required by this section, he shall arrange for the provision of services to such

> children through arrangements which shall be subject to the requirements of this section.
>
> Payment of cost of arranged services from appropriate State allotments
>
> "(f) When the Commissioner arranges for services pursuant to this section, he shall, after consultation with the appropriate public and private school officials, pay the cost of such services from the appropriate allotment of the State under this subchapter."

There is no question but that Congress intended private and parochial schools to benefit from these grants, whether through state and local administration or directly from the federal government. Because control of funds and title to materials is vested in the local public agency (Section 1806(c)(1)), the provision of such materials and services to nonpublic school children is typically accomplished through contractual and lending arrangements. The question you have raised is whether the Department of Elementary and Secondary Education or the local public school districts in this state may participate in making the services outlined above available to children in nonpublic schools.

In Mallory v. Barrera, 544 S.W.2d 556 (Mo.Banc 1976), the Missouri Supreme Court examined Title I of the Elementary and Secondary Education Act of 1965, which provides federal financial assistance for the benefit of educationally deprived children in areas with concentrations of low-income families. Nonpublic school participation in the program is mandated by Title I, and the precise issue raised in Mallory was whether or not Missouri law would permit the use of public school personnel paid with Title I funds to provide teaching services to private school children on the premises of private (sectarian and nonsectarian) schools during regular school hours. The court held, 544 S.W.2d at 561:

> "We are inclined to the view, and hold, (1) that when these funds are paid to the state, as required by the Act (20 U.S.C., § 241g(a)(1)), they must be deposited in the state treasury; (2) that when so deposited, these funds are held by the state in trust for the uses and purposes specified in the Title I program approved by the Federal Commissioner, and may be appropriated and used

> by the state for such of those purposes as are not proscribed by the laws of this state; (3) that that part of these funds in a Title I project which has been approved by the Federal Commissioner for use in a free public school is 'money donated to [a] state fund for public school purposes' within the meaning of the laws of Missouri; (4) that the use of any part of Title I funds by the state to provide teaching services to elementary and secondary school children on the premises of parochial schools would constitute the use of public funds (a) in aid of a denomination of religion proscribed by Art. I, § 7; and (b) to help to support or sustain a school controlled by a sectarian denomination proscribed by Mo.Const. Art. IX, § 8. Harfst v. Hoegen, 349 Mo. 808, 163 S.W.2d 609, 613-614[8, 10] (Mo. banc 1942); Berghorn v. Reorganized School District No. 8, 364 Mo. 121, 260 S.W.2d 573, 582-583 (1953); Paster v. Tussey, 512 S.W.2d 97 (Mo. banc 1974)." (footnotes omitted)

Thus, where federal funds are paid into the state treasury, they are public funds of the state and may not be spent for purposes prohibited by the Missouri Constitution. It should be noted that Title IV funds, like Title I funds, are paid to the state for deposit in the state treasury, 20 U.S.C. § 1802; Mallory, supra at 561, n. 10. The question, therefore, becomes whether or not the purposes for which Title IV funds are to be spent are prohibited by the Missouri Constitution.

In Mallory, the court held that public funds of the state may not be used to provide teaching services to children on the premises of parochial schools. It has also been held that public funds may not be used to provide textbooks for use in parochial schools, Paster v. Tussey, 512 S.W.2d 97 (Mo.Banc 1974); nor may they be used to provide transportation for parochial school students, McVey v. Hawkins, 258 S.W.2d 927 (Mo.Banc 1953); nor may they be used to provide speech clinicians and speech therapy to parochial school children, Special District for Education and Training of Handicapped Children of St. Louis County v. Wheeler, 408 S.W.2d 60 (Mo.Banc 1966).

Title IV funds are used to provide library resources, textbooks, instructional materials, and testing and guidance services and materials. While not all of these particular services have been specifically examined by the courts of this state, we are

unable to find any factor which might distinguish these services from those the provision of which to nonpublic schools has been ruled unconstitutional in Mallory, Paster, McVey, and Special District, supra. In Mallory, supra at 560, the court restated its holding from Special District, supra at 63:

> ". . . '[t]he use of public school funds for the education of pupils in parochial schools is not for the purpose of maintaining free public schools' within the meaning of Mo. Const. Art. IX, § 5, . . ." (Emphasis supplied)

Because library resources, textbooks, instructional equipment, and testing and guidance services and materials unquestionably contribute to the education of pupils, we conclude that neither the Department of Elementary and Secondary Education nor the local educational agencies who administer Title IV funds may spend such funds to provide the above-mentioned materials and services to children attending nonpublic schools under the laws of this state.

II

Section 403(a)(3) of Title IV of the Elementary and Secondary Education Act of 1965 (29 U.S.C. § 1803(a)(3)) requires the state educational agency in preparing its plan to provide:

> ". . . assurances that the requirements of section 1806 of this title (relating to the participation of pupils and teachers in nonpublic elementary and secondary schools) will be met, or certifies that such requirements cannot legally be met in such State;"

In view of the conclusion reached in answer to your first question, it is the opinion of this office that the Department of Elementary and Secondary Education may not provide assurances that the requirements of Section 1806 will be met in this state.

CONCLUSION

It is the opinion of this office that the public school districts in this state may not use funds available to them under Part B of Title IV of the Elementary and Secondary Education Act of 1965 to provide the services described therein to nonpublic school children on nonpublic school premises. It is the further opinion of this office that the Department of Elementary and Secondary Education may not provide assurances pursuant to Section

403(a)(3) of Title IV (20 U.S.C. § 1803(a)(3)) that Title IV funds will be used to benefit children attending nonpublic schools as required by Section 406 (20 U.S.C. § 1806).

The foregoing opinion, which I hereby approve, was prepared by my assistant, Sheila Hyatt.

Yours very truly,

John Ashcroft

JOHN ASHCROFT
Attorney General

SCHOOLS:
COLLEGES:
UNIVERSITIES:
PUBLIC RECORDS:
SUNSHINE LAW:

All records of state colleges and universities concerning faculty and staff salaries and records relating to the financial condition of such colleges and universities, except those specifically excluded by state or federal law, must be made available to members of the public upon request.

OPINION NO. 105

May 17, 1977

FILED
105

Honorable Thomas D. Carver
State Representative, District 137
Room 235B, Captiol Building
Jefferson City, Missouri 65101

Dear Mr. Carver:

This official opinion is issued in response to a request for a ruling on the following question:

> "Are state-funded Missouri colleges and universities required to keep records open and available to the public concerning current individual salaries of their faculty and staff? Also, are records available and open to the public dealing with the general financial conditions of a state college or university?"

Section 610.010(2), RSMo Supp. 1975, defines a "public governmental body" as:

> ". . . any constitutional or statutory governmental entity, including any state body, agency, board, bureau, commission, committee, department, division, or any political subdivision of the state, of any county or of any municipal government, school district or general purpose district, and any other governmental deliberative body under the direction of three or more elected or appointed members having rulemaking or quasi-judicial power;"

Section 610.010(4), RSMo Supp. 1975, defines a "public record" as "any record retained by or of any public governmental body."

20 U.S.C.A. § 1232(g) provides that students' records must be closed to all but the students themselves and their parents, except for some types of information under certain specific circumstances not relevant here.

Section 610.025, RSMo Supp. 1975, would permit records to be closed under the following circumstances.

> "2. Any meeting, record or vote pertaining to legal actions, causes of action or litigation involving a public governmental body, leasing, purchase or sale of real estate where public knowledge of the transaction might adversely affect the legal consideration therefor may be a closed meeting, closed record, or closed vote.
>
> * * *
>
> "4. Any nonjudicial mental health proceedings and proceedings involving physical health, scholastic probation, scholastic expulsion or scholastic graduation, welfare cases, meetings relating to the hiring, firing or promotion of personnel of a public governmental body may be a closed meeting, closed record, or closed vote.
>
> "5. Other meetings, records or votes as otherwise provided by law may be a closed meeting, closed record, or closed vote."

State-funded colleges and universities are public governmental bodies as defined by the statute, therefore, all records retained by these institutions are public records except those authorized or required to be closed under state or federal law. Records as to the current salaries of faculty and staff and all regularly prepared financial statements of these institutions are public records. We enclose Opinion Letter No. 130, dated July 30, 1973, to Representative Wayne Goode, which makes a similar holding.

CONCLUSION

It is the opinion of this office that all records of state colleges and universities concerning faculty and staff salaries and records relating to the financial condition of such colleges and universities, except those specifically excluded by state or federal law, must be made available to members of the public upon request.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Bruce E. Anderson.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Enclosure: Op. Ltr. No. 130
7-30-73, Goode

JOHN ASHCROFT
ATTORNEY GENERAL

Attorney General of Missouri

JEFFERSON CITY
65101

(314) 751-3321

July 7, 1977

OPINION LETTER NO. 106

Honorable Gladys Marriott
State Representative, District 37
Room 313E, Capitol Building
Jefferson City, Missouri 65101

Dear Representative Marriott:

This letter is in response to your request for an official opinion of this office asking the following question:

> "Shall a barber school established in compliance with Chapter 328 RSMo, 1969, be required to include courses of study in arranging, dressing, curling, waving, permanent waving, cleansing, cutting, bleaching, tinting and coloring?"

As indicated by your question, the provisions which govern the education of barbers in preparation for licensure in Missouri are set out in Chapter 328, RSMo.

Among the powers granted the State Board of Barber Examiners is the authority to license and regulate barber schools or colleges. Section 328.120, RSMo, provides in pertinent part:

> "1 . . . The board shall have the right to pass upon the qualifications, appointments, and course of study in the school or college, . . ."

In addition, the requirements for an individual to become licensed as a barber include the following components of Section 328.080, RSMo:

> "2.(3) [Study] for at least one thousand hours in a period of not less than six months in a properly appointed and conducted barber school . . .
>
> * * *
>
> "3. The board shall be the judge of whether the barber school or college is properly appointed and conducted under proper instruction to give sufficient training in the trade."

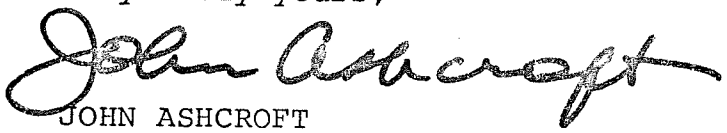
In furtherance of its statutory directive, the Board has promulgated regulations itemizing the subjects which must be taught in schools in order to constitute a proper course of study and give sufficient training in the trade. These regulations appear in 4 CSR 60-2.010(16). We are attaching a copy for your information, and, in the interest of brevity, will not quote each section in full in this opinion.

We note that the above-referenced section of the regulations includes reference to several subjects similar in nature to those listed in your question. We conclude, therefore, that the Board considers mastery by the student of the subjects listed in the regulations a prerequisite to licensure.

By reaching this conclusion, however, we do not mean to infer that such schools are forbidden by law or regulation to instruct in subjects other than those which the Board deems necessary, so long as those subjects are in addition to the state required courses.

We are also enclosing for your information a copy of Opinion No. 223, June 1, 1967, to Casey, which responds to a question somewhat related to your own.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosures: 4 CSR 60-2.010 Rules, Regulations and Curriculum Prescribed for Barber Schools

Op. No. 223
6/1/67, Casey

August 16, 1977

OPINION LETTER NO. 107
Answer by letter-Burns

FILED
107

Honorable Kaye Steinmetz
Representative, District 57
No. 13 Longhenrich Drive
Florissant, Missouri 63031

Dear Representative Steinmetz:

I am enclosing Sections 16 and 17 of 11 CSR 70-2.130, Retailers Conduct of Business. The two new sections became a part of such rule on August 11, 1977. I believe that this answers the question contained in your opinion request.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosure

Title 11—DEPARTMENT OF PUBLIC SAFETY
Division 70—Division of Liquor Control
Chapter 2—Rules and Regulations

PROPOSED AMENDMENTS

11 CSR 70-2.130 Retailers Conduct of Business. The Division of Liquor Control proposes to amend the rule by adding two new sections, (16) and (17). The new sections establish rules for closing of licensed establishments during special elections.

PURPOSE: These amendments establish provisions for special elections when an election is held in only a portion of a political subdivision.

11 CSR 70-2.130 Retailers Conduct of Business

(16) Whenever an election is held in only a portion of a political subdivision and a statute requires that licensed premises be closed for a specified period on the day of such election, only licensed premises located within the areas in which the election is held are to be closed for the period specified by the statute.

(17) Whenever an election is held in only a portion of a political subdivision and a statute requires that licensed premises prohibit the consumption of intoxicating liquor on the day of such election, only licensed premises located within the areas in which the election is held are required to prohibit the consumption of intoxicating liquor for the period specified by the statute.

Auth: section 311.660 RSMo. (1969).

NOTICE TO SUBMIT COMMENTS: Anyone may file a statement in support or in opposition to this proposed rulemaking at the Division of Liquor Control, 505 Missouri Blvd., Jefferson City, Missouri, 65101. To be considered, comments must be received within 30 days after publication of this notice in the Missouri Register. No public hearing is scheduled.

Title 12—DEPARTMENT OF REVENUE
Division 10—Director of Revenue
Chapter 3—State Sales Tax

PROPOSED RECISSION

12 CSR 10-3.170 Computer Printouts. The director of revenue proposes to rescind this rule.

PURPOSE: This rule is being rescinded because its wording and phraseology have, in practice, tended more toward creating confusion than providing adequate guidelines.

[12 CSR 10-3.170 Computer Printouts]

[(1) Persons selling computer printouts, computer output on microfilm or microfiche or computer assisted photo compositions are subject to the sales tax on the gross receipts from all such sales when the sales are made to the purchasers after processing data in order for the purchasers to obtain the desired information contained in the tangible personal property sold. When a purchaser's main objective is the acquisition of the information on the printed material itself, the seller is subject to the sales tax. When a purchaser's main objective is to obtain the benefits of the seller's personal skills, the seller is not subject to the sales tax.]

[(2) Example 1: Dogwell Company contracts with Cumpy Corporation for the purchase of mechanically, electrically and electronically rearranged bookkeeping and accounting information. Dogwell Company provides only the source information. Cumpy Corporation is subject to the sales tax on the gross receipts from the sale of the rearranged information returned to Dogwell in a computerized printout format. If Cumpy was required to perform additional non-computerized analysis or evaluation of the computer printout data in order to furnish the desired information to Dogwell, Cumpy would not be subject to the sales tax.]

[(3) Example 2: Punch Manufacturing Company contracts with Cumpy Corporation to instruct its employees in the use of the computer which it owns. Cumpy Corporation transfers instruction cards to Punch for use in employee training. Cumpy is not subject to the sales tax on the sales of training materials to Punch. If the training materials were sold by Cumpy in conjunction with a sale, lease or license of a computer system, Cumpy would be subject to the sales tax.]

SCHOOLS:
SCHOOL DISTRICTS:

Section 117.011, RSMo, which prohibits the sale of a schoolhouse or school site until another site and house are provided does not apply to a six-director school district which proposes to sell two of its six elementary schools.

OPINION NO. 108

April 20, 1977

FILED
108

Mr. Thomas J. Marshall
Prosecuting Attorney
Randolph County
107 North Fifth Street
Moberly, Missouri 65270

Dear Mr. Marshall:

This opinion is in response to your question which primarily asks:

> "Does §177.011 RSMo, prohibit a proposed sale of two of six elementary schools by the School Board of the Moberly Public School District #81, a six-director district, unless another site and building is provided for each of the two schools to be sold?"

You also ask additional questions in the event that the above question is answered in the negative. However, in view of our answer we direct ourselves only to the question stated.

Section 177.011, RSMo, provides:

> "The title of all schoolhouse sites and other school property is vested in the district in which the property is located. All property leased or rented for school purposes shall be wholly under the control of the school board during such time. No board shall lease or rent any building for school purposes while the district schoolhouse is unoccupied, and no schoolhouse or school site shall be abandoned or sold until another site and house are provided for the school district."

In addition, Section 177.091, RSMo Supp. 1975, provides:

> "1. The school board in each six-director district, as soon as sufficient funds are provided, shall establish an adequate number of elementary schools, and if the demands of the district require more than one elementary school building, the board shall divide the district into elementary school wards and fix the boundaries thereof. The board shall select and procure a site in each ward and erect and furnish a suitable school building thereon.
>
> "2. The board may also establish high schools and may select and procure sites and erect and furnish buildings therefor.
>
> "3. The board may acquire additional grounds when needed for school purposes.
>
> "4. If there is within the district any school property that is no longer required for the use of the district, the board, by an affirmative vote of a majority of the whole board, may authorize and direct the sale of the property. The sale, unless it is to a public institution of higher education, shall be to the highest bidder, and notice that the board is holding the property for sale shall be given by publication in a newspaper within the county in which all or a part of the district is located which has general circulation within the district, once a week for two consecutive weeks, the last publication to be at least seven days prior to the sale of the property; except that, school property may be sold to a city, state agency, municipal corporation, or other governmental subdivision of the state located within the boundaries of said district, for public uses and purposes, by the giving of public notice as herein provided and at such sum as may be agreed upon between the school district and the city, state agency, municipal corporation, or other governmental subdivision of the state. The deed of conveyance shall be executed by the president and attested by the secretary of the board. If

> the district has a seal, it shall be affixed to the deed. The proceeds derived from the sale shall be placed to the credit of the building fund of the district."

In the case of Corley v. Montgomery, 46 S.W.2d 283 (K.C.Mo. App. 1932), the court held in reference to Section 9269, RSMo 1929, which is now Section 177.011, at l.c. 288:

> ". . . So that section 9269, R.S.Mo. 1929, is not dealing with a mere ward school or schoolhouse, but is speaking of districts not so constituted and divided, and prevents the schoolhouse or site in that district from being abandoned or sold until 'another' is provided for that district. The question in the case at bar is not whether a board has the power to abandon the only school established and maintained within a district but whether it has the power to discontinue holding school in what section 9330, R.S.Mo. 1929, calls a 'school ward,' that being merely one of the small fractional parts of the school district which the board, in its discretionary power created and set up in the first instance. It would seem that what the board has power, in its discretion, to create, it would likewise have the discretionary power, in the absence of any statute specifically applicable forbidding it, to discontinue or do away with. The discretionary power to divide the school district into wards, and to use that discretion in regard to both number and size of said wards, would seem to impliedly negative the idea that, after having once made that division, the same must remain forever unchangeable, no matter what 'the demands of the district require' nor how few of said wards, or ward schools, may constitute 'an adequate number' for the district, which quoted expressions are used in said section 9330 giving the board the above mentioned discretionary power. . . ."

We conclude from the above holding that Section 177.011 does not prohibit the board of directors of a six-director school district from selling two of the six elementary schools operated by the board because four elementary schools will remain to which the students, who attended the schools to be closed, may be assigned.

CONCLUSION

It is the opinion of this office that Section 177.011, RSMo, which prohibits the sale of a schoolhouse or school site until another site and house are provided does not apply to a six-director school district which proposes to sell two of its six elementary schools.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

June 28, 1977

OPINION LETTER NO. 109
Answer by Letter - Klaffenbach

FILED
109

Honorable Richard J. DeCoster
Representative, District 1
407A, Capitol Building
Jefferson City, Missouri 65101

Dear Representative DeCoster:

This letter is in response to your question asking whether the Missouri State Council on the Arts is in violation of Article III, Section 38(a) of the Missouri Constitution in entering into certain contracts with artists whereby the artists are to be paid from public funds for their services. You indicate that you are aware of our Opinion No. 155, dated October 8, 1976, to Sikes, in which this office held that the Council has authority to contract with artists for workshops, lectures, demonstrations, performances and art objects without violating Article III, Section 38(a). However, you state that you desire that we give you an opinion based on a review of various contracts made by the Council and the expenditure of funds made by the contracting artists pursuant to the contracts.

The facts that you have given us with respect to this request are not entirely clear. We are of the view, however, that it is unnecessary to go into a detailed investigation of the individual cases in order to clarify whatever misunderstanding there may be with respect to Opinion No. 155-1976.

That opinion, we believe, emphasizes that the Council has the authority to make contracts for certain services in the field of art. A contract, of course, by legal definition, must have as one of its essential elements mutuality of consideration. This means that the Council must receive a valuable consideration

for the consideration that it provides under the contract. If the Council does not receive such consideration there is no lawful contract. A grant or gift on the other hand, such as to be within the prohibition of Section 38(a) of Article III of the Missouri Constitution, lacks the element of mutuality of consideration. We have indicated that the Council may enter into contracts which would serve a public purpose as provided in Section 185.050, RSMo. Payments made under such provisions can only be made on basis of contract and cannot be made as a grant or gift to the individual artist. Again, this means that the Council acting on behalf of the state in performing its duties must act pursuant to the legal authority granted to it and must see that the state receives a quid pro quo. In the absence of mutuality of consideration the contract is a nullity.

Clearly, there is some discretion in the Council as to the exercise of powers granted to it by law. Because the Council's authority is limited by the law of contract, we emphasize, the determining factor is what the Council receives on behalf of the public by the artist and not what the artist does with the consideration he receives under the contract.

We conclude that the Council has no authority to expend public moneys without consideration and that the authority it has, as noted in Opinion No. 155-1976, is to enter into contracts. The Council is required to receive adequate consideration from the other contracting party and is not authorized to make gifts or grants to private parties.

We are further of the view that individual consideration of such contracts is not the proper subject of an official opinion of this office under the provisions of Section 27.040, RSMo.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosure: Op. No. 155
10/8//76, Sikes

SHERIFFS:
CIRCUIT ATTORNEYS:
PROSECUTING ATTORNEYS:

The term "prosecuting attorney" referred to in the last sentence of Section 58.715, RSMo Supp. 1975, means, as applied to the City of St. Louis, the circuit attorney of the City of St. Louis. The duties of the sheriff which are prescribed by law for coroners are to be carried out by the circuit attorney of the City of St. Louis in case of a vacancy in the office of the sheriff of the City of St. Louis.

OPINION NO. 111

April 15, 1977

FILED
111

Honorable Thomas W. Shannon
Prosecuting Attorney for the St. Louis
Court of Criminal Correction of
St. Louis City
1320 Market Street, Room 153
St. Louis, Missouri 63103

Dear Mr. Shannon:

This is in response to your request for an opinion from this office as follows:

> "In the event of a vacancy in the office of the Sheriff of the City of St. Louis, are the duties prescribed by Sections 58.210 and 58.715 R.S.Mo (1973) assumed by the Prosecuting Attorney for the St. Louis Court of Criminal Correction of St. Louis City or the Circuit Attorney of the City of St. Louis?"

Your request seeks our interpretation of Section 58.715, RSMo Supp. 1975. This statute, along with other "medical examiner" provisions (Sections 58.700-58.765, RSMo Supp. 1975) was enacted by the General Assembly in 1973 (Laws 1973, S.B. 122, Sections 1-17).

> "The basic thrust of [these] . . . statutory provisions . . . is to abolish mandatorily the office of county coroner in certain classes of counties and to create the office of county medical examiner. In all other counties, the local electorate is given the right to choose whether to replace the office of county coroner with that of county

> medical examiner. . . ." State ex rel. McClellan v. Godfrey, 519 S.W.2d 4, 6 (Mo. Banc 1975)

The medical examiner provisions essentially abolish the county coroner's office in certain counties and transfer the coroner's duties to the appointed medical examiner and county prosecuting attorney. In McClellan the Missouri Supreme Court held that the medical examiner provisions of Sections 58.700-58.765 were applicable to and could be adopted by the City of St. Louis pursuant to the procedures set forth in Section 58.760. We understand from your request that the provisions of Sections 58.700-58.765 were subsequently proposed to and adopted by the City of St. Louis, that a city medical examiner has been appointed pursuant to Section 58.700, and that the office of coroner of the City of St. Louis has been abolished pursuant to Section 56.755.

Section 58.715 provides as follows:

> "In addition to the duties prescribed by sections 58.010, 58.020, 58.060, 58.090, 58.160, 58.375, 58,451, 58,455 and 58.700 to 58.765 the medical examiner shall perform those duties and functions prescribed by law for coroners which are not in conflict with the provisions of sections 58. 010. 58.020, 58.060, 58.090, 58.160, 58.375, 58.451, 58,455, and 58.700 to 58.765; except that, the medical examiner shall not perform any duty of the sheriff. The duties of the sheriff which are prescribed by law for coroners shall be performed by the prosecuting attorney in all counties in which there is a medical examiner."

The duties of the sheriff prescribed by law for the county coroner, in the event of a vacancy in the sheriff's office, are found in Section 58.200, RSMo 1969, which states as follows:

> "When the office of sheriff shall be vacant, by death or otherwise, the coroner of the county is authorized to perform all the duties which are by law required to be performed by the sheriff, until another sheriff for such county shall be appointed and qualified, and such coroner shall have

> notice thereof, and in such case, said coroner may appoint one or more deputies, with the approbation of the judge of the circuit court; and every such appointment, with the oath of office endorsed thereon, shall be filed in the office of the clerk of the circuit court of the county."

The duties of the sheriff prescribed by law for the coroner of the City of St. Louis, in the event the city sheriff is for any reason disqualified to act or refuses to act, are found in Section 58.210, RSMo Supp. 1975, which states as follows:

> "The coroner of the city of St. Louis shall do and perform all acts and exercise all powers within the limits of the city of St. Louis required or authorized by law to be performed by coroners in this state. The coroner is ex officio public elisor of the city, and in his capacity as public elisor shall perform all the duties and exercise all the powers of sheriff in the city, and perform all the duties and exercise all the powers of a constable in the city, in all cases where the sheriff or any constable of the city is for any reason disqualified to act, or refuses to act. The coroner of the city of St. Louis shall receive an annual salary of ten thousand five hundred dollars as full compensation for his services as coroner and as public elisor. The coroner shall appoint two deputies and a chief clerk, whose appointment shall be made in writing and filed with the mayor of the city of St. Louis. The deputies and chief clerk shall serve during the pleasure of the coroner. The deputies shall each take the same oath, have the same powers, perform the same duties and exercise the same authority as the coroner, who is responsible for their official conduct. The deputies shall receive an annual salary of ten thousand five hundred dollars each, and the chief clerk shall receive an annual salary of seven thousand six hundred dollars, which salaries shall be paid in equal monthly installments, as

> other official salaries in the city of St. Louis are paid. The salaries provided by this section are in lieu of all fees."

We find no statutory or constitutional provisions exclusively relating to vacancies in the office of the sheriff of the City of St. Louis. In any event, whether the provisions of Section 58.200 or 58.210 apply to the facts detailed in your request, it appears that the duties and powers of the sheriff of the City of St. Louis are to be performed and exercised by the coroner of the City of St. Louis when either the city sheriff's office is vacant or the city sheriff is for any reason disqualified to act or refuses to act. Since the City of St. Louis has adopted the "medical examiner" provisions of Sections 58.700-58.765, those duties and powers prescribed by law for coroners are now to be performed by the "prosecuting attorney" pursuant to Section 58.715. We understand your inquiry to be whether the term "prosecuting attorney" contained in the last sentence of Section 58.715 pertains to the circuit attorney of the City of St. Louis or the prosecuting attorney for the St. Louis Court of Criminal Correction of St. Louis City.

The duties and responsibilities of the circuit attorney of the City of St. Louis and the prosecuting attorney for the St. Louis Court of Criminal Correction of St. Louis City are outlined in Sections 56.430-56.620, RSMo. Section 56.430, RSMo 1969, provides:

> "At the general election to be held in this state in the year 1948, and every four years thereafter, there shall be elected in the city of St. Louis one circuit attorney, who shall reside in said city, and shall possess the same qualifications and be subject to the same duties that are prescribed by this chapter for prosecuting attorneys throughout the state, and the city register of said city shall transmit to the secretary of state an abstract of the votes given for each candidate for circuit attorney in said city, in the same manner as is required by law of clerks of county courts."

Section 56.440, RSMo 1969, provides:

> "At the general election in the year 1950 and every four years thereafter, there shall

> be elected by the qualified voters of St. Louis city a prosecuting attorney, to be styled, 'The Prosecuting Attorney for the St. Louis Court of Criminal Correction of St. Louis City'. Said prosecuting attorney shall possess the same qualifications as required by law for circuit attorneys; he shall hold his office for the term of four years, and until his successor shall be duly elected and qualified, unless sooner removed from office. The duty of transmitting the abstract of the votes by which said officer is elected shall be performed by the register of said city, as provided in section 56.430."

Comparing these two provisions, it is clear that the qualifications of the prosecuting attorney for the St. Louis Court of Criminal Correction of St. Louis City are the same as the qualifications of the circuit attorney of the City of St. Louis which in turn are the same as those prescribed for all prosecuting attorneys throughout the state in Section 56.010, RSMo Supp. 1975. While the qualifications of the circuit attorney of the City of St. Louis and the prosecuting attorney for the St. Louis Court of Criminal Correction of St. Louis City are identical, Section 56.430 additionally prescribes that the circuit attorney of the City of St. Louis shall ". . . be subject to the same duties that are prescribed by this chapter for prosecuting attorneys throughout the state, ..." Thus, while the circuit attorney of the City of St. Louis and the prosecuting attorney for the St. Louis Court of Criminal Correction of St. Louis City must have the same qualifications, only the circuit attorney possesses the same duties and responsibilities as prescribed by Chapter 56 for prosecuting attorneys throughout the state of Missouri.

Sections 56.060 and 56.070, RSMo Supp. 1975, set forth general duties of county prosecuting attorneys. They provide as follows:

> "1. Each prosecuting attorney shall commence and prosecute all civil and criminal actions in his county in which the county or state is concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county. In all cases, civil and criminal, in which changes of venue are granted, he

shall follow and prosecute or defend, as the case may be, all the causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses. If any misdemeanor case is taken to the court of appeals by appeal he shall represent the state in the case in the court and make out and cause to be printed, at the expense of the county, all necessary abstracts of record and briefs, and if necessary appear in the court in person, or shall employ some attorney at his own expense to represent the state in the court, and for his services he shall receive the compensation that is proper, not to exceed twenty-five dollars for each case, and necessary traveling expenses, to be audited and paid as other claims are audited and paid by the county court of the county.

"2. Notwithstanding the provisions of subsection 1, in any county of the first class not having a charter form of government for which a county counselor is appointed, the prosecuting attorney shall only perform those duties prescribed by subsection 1 which are not performed by the county counselor under the provisions of law relating to the office of county counselor."

"1. The prosecuting attorney shall represent generally the county in all matters of law, investigate all claims against the county, and draw all contracts relating to the business of the county. He shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court or any judge thereof, except in counties in which there is a county counselor. He shall, without fee, give his opinion to any magistrate court, if required, on any question of law in any criminal case, or other case in which the state or county is concerned, pending before the court.

> "2. Notwithstanding the provisions of subsection 1, in any county of the first class not having a charter form of government for which a county counselor is appointed, the prosecuting attorney shall only perform those duties prescribed by subsection 1 which are not performed by the county counselor under the provisions of law relating to the office of county counselor."

In State ex rel. Thrash v. Lamb, 141 S.W. 665, 669 (Mo.Banc 1911), the Missouri Supreme Court, in construing the provisions of what is now Section 56.060, stated:

> "The history of this legislation shows that, since 1825, it has been the policy of this state, as indicated by the various acts passed by the Legislature, to impose upon the local state's attorney, whether known as the circuit or prosecuting attorney, the duty of instituting proceedings in behalf of the state in matters arising within his local jurisdiction. . . ."

We would also refer you to Attorney General's Opinion No. 113 issued June 25, 1975, copy enclosed, in which it was held that the prosecuting attorney is each county and the circuit attorney of the City of St. Louis have authority to institute civil collection remedies for the collection of monies assigned to the state under the provision of Public Law 93-647 relating to family support. In that opinion the Attorney General noted that under Section 56.430 the circuit attorney of the City of St. Louis has the same duties and responsibilities as prescribed by law for prosecuting attorneys throughout the state.

Section 58.715 provides that in counties in which the medical examiner provisions of Sections 58.700-58.765 are adopted the county prosecutor shall perform the duties of the county sheriff which are prescribed by law for the county coroner. In effect, these duties of the coroner are transferred to the county prosecuting attorney rather than the appointed county medical examiner. Since the City of St. Louis has adopted the medical examiner provisions of Sections 58.700-58.765, it is apparent that the legislature intended that, pursuant to Section 58.715, the duties of the city sheriff prescribed by law for coroners in Section 58.210 are to be transferred to and assumed by the city's functional equivalent of county prosecuting attorney, the circuit attorney of the City of St. Louis.

CONCLUSION

It is therefore the opinion of this office that the term "prosecuting attorney" referred to in the last sentence of Section 58.715, RSMo Supp. 1975, means, as applied to the City of St. Louis, the circuit attorney of the City of St. Louis. The duties of the sheriff which are prescribed by law for coroners are to be carried out by the circuit attorney of the City of St. Louis in case of a vacancy in the office of the sheriff of the City of St. Louis.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Greg Hoffmann.

Yours very truly,

John Ashcroft

JOHN ASHCROFT
Attorney General

Enclosure: Op. No. 113
Graham, 6-25-75

JUDGES: An incumbent magistrate judge who is presently over 76 years of age is required under the provisions of Section 476.458, RSMo Supp. 1976, to retire December 31, 1978, the end of his term.

OPINION NO. 112

April 21, 1977

FILED
112

Honorable Henry A. Panethiere
State Senator, District 11
Room 424, State Capitol Building
Jefferson City, Missouri 65101

Dear Senator Panethiere:

This opinion is in answer to your opinion request asking whether a magistrate judge who was born in 1898 and is therefore over 76 years of age and who is serving a four year term ending December 31, 1978, is eligible to be a candidate for reelection to such office in 1978.

You also ask other questions; however, in view of our answer to your first question, we believe it is unnecessary to respond to such other questions.

Section 476.458, RSMo Supp. 1976, provides:

> "1. Except as otherwise provided in this section, or by any other law, magistrate judges, probate judges, and probate ex officio magistrate judges shall retire at the age of seventy years and may participate, if otherwise eligible, in the retirement plan established by sections 476.515 to 476.570, except that, the provisions of sections 476.458, 478.071, 478.072, 481.205, 482.040, 482.090, 482.150, 482.230, 482.300 to 482.365 and 483.497, RSMo, shall not prevent any person holding the office of magistrate judge, probate judge or probate ex officio magistrate judge, or any person elected or appointed to the office of magistrate judge, probate judge or probate ex officio magistrate judge from holding office during the remainder of the term to which he was elected or appointed.

> "2. Any magistrate judge, probate judge not under the nonpartisan court plan, or probate ex officio magistrate judge who on August 13, 1976, or within six months thereafter, is seventy years of age or older, may petition the commission on retirement, removal and discipline to continue to serve until age seventy-six if he has not completed a total of twelve years of service as a judge. Except as otherwise provided by any other law, any magistrate judge, probate judge not under the nonpartison [sic] court plan, or probate ex officio magistrate judge, who is in office on August 13, 1976, may, within six months before attaining the age of seventy years, petition the commission on retirement, removal, and discipline to be allowed to serve after he has attained that age until age seventy-six or has completed a total of twelve years of service as a judge, whichever shall occur first. If the commission finds the petitioner to be able to perform his duties and approves such service, the petitioner may continue to serve as such a judge until age seventy-six if he has not completed a total of twelve years of service as a judge at such age. No person shall be permitted to serve as such a judge beyond the age of seventy-six years regardless of whether or not he has completed a total of twelve years except for the purpose of completing the term to which he was elected or appointed, as provided in subsection 1 of this section.
>
> "3. Any magistrate, regardless of age elected in 1976 to fill an unexpired term shall be permitted to complete that term."

We do not quote or discuss the provisions of the amendments to Article V of the Constitution (see RSMo Supp. 1976) because such provisions are not effective until January 2, 1979.

Section 30, Article V of the present Constitution does not require judges who are not under the nonpartisan court plan to retire at 70. Section 476.458 requires magistrate judges to retire at 70 years of age. Clearly, such a magistrate is not subject to mandated retirement before the expiration of his present

term because he is allowed to complete his term under the statute. Section 30, Article V of the present Constitution provides that all other members of the judiciary (other than those judges appointed under the provisions of Section 29(a)-(g) of Article V) shall be subject to and participate in such provisions as to retirement as may be provided by law. Therefore, the legislature has the authority to mandate the retirement of such judges.

On the other hand, the judge who is now over 76 years of age would not be eligible to serve a term which commences under Section 482.050, RSMo, on January 1, 1979. Neither the statutory provisions nor the new constitutional provisions relating to the function of the Commission on the Retirement of Judges with respect to the extension of such judge's service are applicable to such a judge who is over 76 years of age.

Thus, under the present circumstances, the judge is required by statute to retire at the end of his term. Clearly, such a judge is not eligible to be a candidate for reelection in 1978 or to serve a term beginning January 1, 1979.

CONCLUSION

It is the opinion of this office that an incumbent magistrate judge who is presently over 76 years of age is required under the provisions of Section 476.458, RSMo Supp. 1976, to retire December 31, 1978, the end of his term.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,

JOHN ASHCROFT
Attorney General

December 27, 1977

OPINION LETTER NO. 113

Mr. Stephen C. Bradford
Commissioner
Office of Administration
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Bradford:

This letter is in response to your predecessor's questions asking:

> "A. Pursuant to Section 111.801, RSMo Supp. 1975, is the State responsible for any costs in the 1976 primary and/or general elections where special propositions were submitted to the voters in addition to the primary and general candidates, and; if the answer is yes, what is the State's share of the election costs?
>
> "B. Pursuant to Section 111.801, RSMo Supp. 1975, is the State responsible for any costs in the election held on February 15, 1977, for filling a State Senate seat in the 28th District, and the election held on December 28, 1973, for filling a State Representative seat in the 12th District; and if the answer is yes, what is the State's share of the election costs?"

The request also states:

"In 1976 in the general and primary elections, special propositions concerning statewide questions were submitted along with the ballots for the candidates in the primary and general elections. Jefferson County has submitted to the State the cost of the primary and general elections in 1976 in Jefferson County and is requesting that the State pay half of these costs pursuant to Section 111.801, RSMo Supp. 1975. Attached is the correspondence requesting payment by the State.

"In an election held on February 15, 1977, for a State Senator in the 28th District, and an election held on December 28, 1973, for a State Representative in the 12th District, voters in the districts elected a Senator and a Representative to fill vacancies. Linn County and Macon County have submitted to the State the entire cost of holding these elections. Attached is the correspondence regarding these claims."

Section 111.801, RSMo Supp. 1975, provides:

"1. All costs of any election, not otherwise provided for by law, shall be paid in equal portions by each authority submitting a question or proposition at the election.

"2. When a question is submitted to a vote of all of the electors in the state, and no other question is submitted at the same election, all costs of the election shall be paid by the state.

"3. After an audit by the commissioner of administration the state treasurer shall pay the amounts claimed by and due the respective political subdivisions out of moneys appropriated by the legislature for that purpose."

It is our understanding that the present confusion arises because of the last amendment to this section by Laws of Missouri 1971, p. 183, Section 1, which added what is now subsection 1 of Section 111.801 and assigned numbers to the subsequent two paragraphs which were taken from prior laws.

We note, for historical purposes, that the earlier provision on this subject was numbered Section 111.405, RSMo 1959, and it and subsequent amendments were interpreted by this office in Opinions No. 49, dated July 27, 1955, to Kirtley; No. 19, dated January 20, 1956, to Connett, No. 3, dated February 24, 1956, to Atterbury; No. 161, dated March 4, 1970, to Lawson; and No. 181, dated May 18, 1970, to Bauer.

We also note, for historical purposes, that Section 111.801 was first introduced in the legislative process in House Bill 149 of the 76th General Assembly containing the same provision as it did upon final passage.

It is our understanding that there is considerable confusion as to whether the terminology "not otherwise provided for by law" as contained in subsection 1 modifies "election" or whether it modifies "costs of any election". We further understand that there is considerable confusion as to precisely what the legislature intended by the use of the word "question" in conjunction with the use of the word "proposition" in such subsection.

We have given this subsection a thorough examination in light of our prior opinions on the subject of election costs, the history of the law and its relationship to other laws, and we are of the view that it is impossible to determine how the Missouri courts would resolve these questions.

In our view the legislative intent is not fairly determinable from the provision. The Missouri Supreme Court has in the past ruled that the court may consider a law void if it is too vague to permit reasonable interpretation. Missouri Pacific Railroad Co. v. Morris, 345 S.W.2d 52 (Mo.Banc 1961). Such a holding is based on the view that where a statute is unduly vague an interpretation would be tantamount to legislation and thus would be improper under the constitutional prohibition respecting the separation of powers.

Similarly, it is our view that we would not be serving your office properly by unduly speculating as to the legislative intent. Therefore, it is our view that subsection 1 of Section 111.801 is too vague for reasonable interpretation insofar as expenditure of state funds is concerned and that accordingly, you should not attempt to make any expenditures of state funds based upon that section.

We further note that Section 111.801, RSMo Supp. 1975, has been repealed by Senate Substitute for House Bill 101, First

Regular Session, 79th General Assembly, effective January 1, 1978, and therefore that the analysis contained herein pertains only to costs incurred under the old language.

Very truly yours,

JOHN ASHCROFT
Attorney General

JOHN ASHCROFT
ATTORNEY GENERAL

Attorney General of Missouri

JEFFERSON CITY
65101

(314) 751-3321

April 27, 1977

OPINION LETTER NO. 115

Dr. Arthur L. Mallory
Commissioner of Education
State Department of Elementary and
Secondary Education
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Dr. Mallory:

This letter is in response to your request for our review and certification of the Department of Elementary and Secondary Education's Annual Program Plan for Adult Education Programs under the Adult Education Act of 1970, as amended.

Our review has taken into consideration the Adult Education Act of 1970, P.L. 91-230, as amended; the federal regulations applicable to such act, (45 C.F.R. parts 100, 166, 167, (October 1, 1976)); Article III, Section 38(a), Article IV, Section 15, and Article IX, Sections 1(b), 2(a) and 2(b), Missouri Constitution; Sections 161.092, 171.096, and 178.430, RSMo 1969; and Section 171.091, RSMo Supp. 1975, and related provisions.

It is the opinion of this office that:

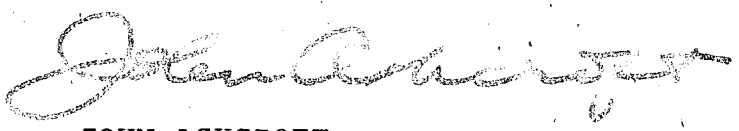
1. The Missouri State Department of Elementary and Secondary Education is the state agency primarily responsible for the state supervision of public elementary and secondary schools and is, therefore, the "State education agency" as that term is defined in 20 U.S.C. Section 1202(h).

2. The Department of Elementary and Secondary Education has the authority under state law to submit this Annual Program Plan.

3. The State Treasurer has authority under state law to receive, hold and disburse federal funds under the Annual Program Plan.

4. All of the provisions of the foregoing plan are consistent with state law.

Very truly yours,



JOHN ASHCROFT
Attorney General

April 27, 1977

OPINION LETTER NO. 116
Answer by Letter - Hyatt

FILED
116

Dr. Arthur L. Mallory
Commissioner of Education
State Department of Elementary and
Secondary Education
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Dr. Mallory:

In accordance with your request of April 15, 1977, we have reviewed the Missouri State Department of Elementary and Secondary Education's "Title I, ESEA, Annual Program Plan, Fiscal Year Ending September 30, 1978." This application for federal funds is being submitted under Title I of the Elementary and Secondary Education Act of 1965, P.L. 89-10, as amended.

In addition to the Elementary and Secondary Education Act of 1965, as amended, and the regulations propounded pursuant thereto (45 C.F.R. 116, October 1, 1976 edition), our review has taken into consideration Article III, Section 38(a), Missouri Constitution, and Section 161.092, RSMo Supp. 1975.

Based on the foregoing, we hereby certify that the Missouri State Department of Elementary and Secondary Education has authority under state law to perform the duties and functions of a state educational agency under Title I of the Elementary and Secondary Education Act of 1965, as amended, and the regulations propounded pursuant thereto, including those arising from the assurances set forth in the application.

In addition to this opinion letter which constitutes our official certification, we have executed the form of certification attached to the Annual Program Plan.

Very truly yours,

JOHN ASHCROFT
Attorney General

STATE AUDITOR:
DEPARTMENT OF MENTAL HEALTH:

The State Auditor has access to information contained in individual personnel files maintained at the Department of Mental Health and its facilities even though parts of such files may be confidential to the extent that such files relate to the duty of the Auditor to post-audit the financial condition of such institutions.

OPINION NO. 117

December 7, 1977

FILED
117

Honorable Thomas M. Keyes
State Auditor
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Keyes:

This opinion is in answer to your following question:

> "Do auditors of the state auditor's office have free access to all documents contained within the personnel files belonging to the Department of Mental Health, which is required to be audited by the state auditor, even when such documents and/or the entire personnel files have been designated as confidential information by the department?"

The additional facts which you supplied to us in your opinion request are:

> "State auditor's staff conducting an audit examination of Marshall State School & Hospital was denied access to the employees' medical records and patrol investigation reports which are contained in the personnel files of this Department of Mental Health facility. Such documents are routine records which are obtained for all employees and become a permanent part of the personnel files.
>
> "The Department of Mental Health considers these records to be confidential and therefore not available to the state auditor for examination until prior written approval of the individual employee(s) is obtained."

Applicable state laws concerning the duties of the Auditor and penalties are:

Section 29.130, RSMo 1969, states:

> "The state auditor shall have free access to all offices of this state for the inspection of such books, accounts and papers as concern any of his duties."

Section 29.235.1, RSMo 1969, states:

> "All audits shall conform to recognized governmental auditing practices."

Section 29.250, RSMo 1969, states:

> "If any such officer or officers shall refuse to submit their books, papers and concerns to the inspection of the state auditor, or any of his examiners, or if anyone connected with the official duties of the state, county, institution, or political subdivision of the state, shall refuse to submit to be examined upon oath, touching the officers of such county or political subdivision, the state auditor shall report the fact to the prosecuting attorney, who shall institute such action or proceedings against such officer or officers as he may deem proper."

Section 29.260, RSMo 1969, states:

> "Nothing done in sections 29.010 to 29.360 shall preclude any officer or officers in charge of the offices and institutions mentioned in said sections from having proper recourse in the courts of law in this state."

Section 29.340, RSMo 1969, states:

> "Any state or county official affected by this chapter who shall refuse or fail to comply with the provisions of this chapter shall be deemed guilty of a misdemeanor."

Section 29.130 indicates that the State Auditor shall have free access to all offices of this state for the inspection of such documents and papers as concern any of his duties.

The State Auditor pursuant to Section 29.200, RSMo 1969, has a duty to post-audit the accounts of the Department of Mental Health. To the extent that the data and records contained in the personnel file maintained by the Department of Mental Health and its facilities on its employees reasonably relate to the duties of the State Auditor in performing his post-audit of the financial condition of that agency such data and records are to be made available to him. However, the Department and the facilities are not required to provide to the State Auditor data or records contained in the personnel files which are not directly relevant to the Auditor's duty to conduct a post-audit of the financial condition of the Department or the facilities.

Recently, the Supreme Court of Missouri in Director of Revenue v. State Auditor, 511 S.W.2d 779 (Mo. 1974), discussed the duty of the State Auditor to conduct a post-audit of the financial records of various state agencies and his access to certain material. The court held that Article IV, Section 13 of the Missouri Constitution requires no more of the State Auditor than that he verify that the financial picture of a department by examination after the fact of the financial statements of the transactions of the department and present his opinion as to the fairness with which the financial statements illustrate the financial position of the department. Accordingly, the court denied the State Auditor's request for detailed information from tax returns filed by taxpayers of this state because the court found that the information contained on tax returns was not related to the State Auditor's duties.

Under this holding, unless the data and records which are requested by the State Auditor are directly relevant to performing his duty of conducting a post-audit as to the financial status of the Department and its facilities, the Auditor has no statutory authority to demand access to such data and records.

In this connection we point out that the basic question which has to be answered under the particular facts of each case is whether or not the Auditor has the duty and authority to inspect such data and records. The question is not whether the particular records are confidential under state law because it is clear that even though records may be confidential under state law, the Auditor would have the authority to see such records when he is acting in the proper performance of his official duties. Article IV, Section 13 of the Missouri Constitution.

It is our understanding that the Department of Mental Health has requested the State Auditor to demonstrate how such information relates to his duties to conduct a post-financial audit. It is further our understanding that the department has not refused the

State Auditor access to such information except to the extent that the Department believes that the information is not within the scope of the Auditor's duties. We believe that it is reasonable for a state agency to request the State Auditor to show how the information requested by him relates to his authority to conduct a post-financial audit provided there is a substantial question as to whether the Auditor's request may be in excess of his authority.

Clearly, the Auditor has the power to subpoena the records pursuant to Section 29.235.2, RSMo 1969. Further in the event the prosecuting attorney institutes action pursuant to Section 29.250, RSMo 1969, to compel the department to make certain records or information available to the Auditor, the burden will be on the Auditor to demonstrate that such information relates to his duties. However, we do not believe or suggest that it should become the practice of the State Auditor to initiate legal action against such officers in every instance in which there appears to be a legitimate refusal by a state agency to produce documents and records. Clearly, it is the duty of state officers, whether elected or appointed, to exercise a high degree of cooperation so that the duties of each can be performed expeditiously and in a manner consistent with the public interest. In this respect, since the Office of the Attorney General is placed in a position initially of representing all state officers under Chapter 27, RSMo, such differences as may exist between such officers should, in each particular case, be resolved to the extent possible by such officers with the assistance of the Office of the Attorney General. Attorneys from this office will be available to assist the Auditor and the various state agencies in specific factual situations to the extent consistent with the legal views of this office.

CONCLUSION

It is the opinion of this office that the State Auditor has access to information contained in individual personnel files maintained at the Department of Mental Health and its facilities even though parts of such files may be confidential to the extent that such files relate to the duty of the Auditor to post-audit the financial condition of such institutions.

The foregoing opinion, which I hereby approve, was prepared by my assistants, Terry C. Allen and Daniel P. Card II.

Yours very truly,

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

September 27, 1977
OPINION LETTER NO. 118

Honorable Wesley S. Miller
State Representative, District 121
c/o House Post Office
State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Miller:

This is in response to your request for an official opinion asking whether it is legal for a public school board to charge public school students who drive to school a parking fee for parking on school grounds.

Article IX, Section 1(a) of the Missouri Constitution provides:

> "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law. . . ."

Although parking fees were not specifically discussed, the Missouri Supreme Court's recent decision invalidating registration and course fees indicates that Missouri has aligned itself with those jurisdictions which hold that the imposition of at least some fees is contrary to state constitutional provisions for "free public schools." Concerned Parents v. Caruthersville School District, 548 S.W.2d 554 (Mo. 1977). See also Paulson v. Minidoka County School District No. 331, 463 P.2d 935 (Idaho 1970); Bond v. Ann Arbor School District, 178 N.W.2d 484 (Mich. 1970); Granger v. Cascade County School District No. 1, 499 P.2d 780 (Mont. 1972).

In Caruthersville, supra at 562, the Supreme Court of Missouri held there could be ". . . no admission charge (whether called tuition, registration fee or some other name) and no charge for instruction, which means no course fees." It remanded for trial the question of the constitutionality of requiring students to furnish materials and equipment for use in class. The court suggested that at trial the parties offer proof as to whether such items were "an integral part of free public schools in which there is gratuitous instructions" and whether "at the time the constitutional requirement was adopted, the people drafting and adopting the provision understood the language to encompass such things. . . ." Caruthersville, supra at 554.

Other tests formulated by courts which have held charges for books, supplies, equipment, or activities unconstitutional are whether the items are "necessary elements of any school's activity", Paulson, supra; an "integral fundamental part of the elementary and secondary education", Bond, supra, or "reasonably related to a recognized academic and educational goal", Granger, supra.

Consistent with this approach, Attorney General Opinion No. 269, 1972, ruled that a school district may not charge fees for band instruments or materials for making products where those courses are offered for academic credit, but fees may be charged for extracurricular activities, for late library returns, and for lost or damaged school property.

The question which must be asked, therefore, is whether school parking privileges are an integral, fundamental part of the educational function of the school. An unstrained application of this principle leads to the conclusion that parking fees are constitutional because student parking on school grounds would not appear to be a necessary element or an integral, fundamental part of the school's activity. Nor could it be said that a parking lot is reasonably related to a recognized academic and educational goal. Obviously, getting to school is necessary for education to occur but it has not been asserted that students cannot get to school unless parking on school property is provided. Therefore, providing student parking is not an "ordinary school expense", nor is it "peculiarly necessary" for using the school.

For these reasons, it is our view that a school district which provides space on its school grounds for student parking may constitutionally impose a reasonable fee for its use.

Having concluded there is no constitutional barrier to the imposition of student parking fees, an additional question which must be answered is whether school boards are empowered by any statute to charge such fees.

There is no statutory provision imposing a duty on a school board to provide parking with or without a fee. However, Section 171.011 RSMo 1969, provides in relevant part:

> "The school board of each school district in the state may make all needful rules and regulations for the organization, grading and government in the school district. . . ."

In addition, Section 177.031, RSMo 1969, states in part:

> "1. The school board has the care and keeping of all property belonging to the district, . . . shall keep the schoolhouses and other buildings in good repair, the grounds belonging thereto in good condition, . . ."

We enclose Opinion No. 82, rendered September 2, 1970, to Representative Richard M. Marshall, which holds that a school district may lease or rent school real estate for a fair and reasonable consideration.

We believe such opinion is applicable in the premises. Under the reasoning in such opinion, it is our view that a school district board can impose reasonable fees for student parking on public school grounds.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Enclosure: Op. No. 82,
9/2/70, Marshall

ASSESSMENTS:
MOTOR VEHICLES:

Under the provisions of subsection 2 of Section 150.040, RSMo Supp. 1976, the gross amount received by the merchant for new motor vehicles is to be computed on the basis of the entire amount received from the sale of "new" motor vehicles as provided in Section 150.040(2), including the value of any trade-ins.

OPINION NO. 120

May 4, 1977

FILED
120

Robert F. Love, Chairman
Missouri State Tax Commission
623 East Capitol Avenue
Jefferson City, Missouri 65101

Dear Mr. Love:

This opinion is in response to your request asking as follows:

> "How is the term 'gross amount received from sales' defined as used in section 150.040(2), R.S.Mo. 1976 Supp., which provides that the inventory valuation for assessment of the ad valorem tax on new vehicles shall be 9.5% of the gross amount received from sales by merchants for new motor vehicles sold by them from January 1 through March 31, of each year?"

You further state:

> "The question revolves around the point of whether the 'gross amount received from sales' is inclusive or exclusive of trade in value, i.e., if a new car is sold for $6,000 and a car worth $5,000 is received in trade in, is the 'gross amount received from sales' $6,000 or $1,000?"

Section 150.040, RSMo Supp. 1976, was the legislative response to the holding of the Supreme Court of Missouri in McKay Buick Inc., v. Spradling, 529 S.W.2d 394 (Mo.Banc 1975), in which the court held a prior enactment respecting the taxation of motor vehicles to be unconstitutional.

Section 150.040, RSMo Supp. 1976, provides:

> "1. Merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares and merchandise, except new motor vehicles, which they may have in their possession or under their control, whether owned by them or consigned to them for sale, at any time between the first Monday in January and the first Monday in April in each year; provided, that no commission merchant shall be required to pay any tax on any unmanufactured article, the growth or produce of this or any other state, which may have been consigned for sale, and in which he has no ownership or interest other than his commission.
>
> "2. Merchants shall pay an ad valorem tax equal to that which is levied upon real estate on new motor vehicles. The inventory valuation for assessment purposes for the ad valorem tax on new motor vehicles shall be nine and one-half percent of the gross amount received from sales by merchants for new motor vehicles sold by them from January first through March thirty-first of each year, and the assessor of each county and the city of St. Louis shall have the authority to inspect the books of each merchant for the purpose of determining said sales."

The question that now confronts us is what the legislature intended by the use of the words "gross amount received from sales by merchants for new motor vehicles." In Laclede Gas Company v. City of St. Louis, 253 S.W.2d 832 (Mo.Banc 1953), the Supreme Court defined the term "gross receipts", l.c. 835, as follows:

> "The word 'gross' appearing in the term 'gross receipts,' as used in the ordinance, must have been and was there used as the direct antithesis of the word 'net.' In its usual and ordinary meaning 'gross receipts' of a business is the whole and entire amount of the receipts without deduction. 18 Words and Phrases, Perm.Ed., page 697. On the contrary 'net receipts' usually are the receipts which remain after deductions are made from

> the gross amount thereof of the expenses and cost of doing business, including fixed charges and depreciation. Gross receipts become net receipts after certain proper deductions are made from the gross. . . ."

We note first of all that subsection 2 of Section 150.040 concerns only "new" motor vehicles and employs a distinct and particular formula to arrive at assessment value. Clearly, when the automobile dealer receives a used car in trade on a "new" motor vehicle, he is in fact receiving a thing of value.

It is our view that inasmuch as the legislature in subsection 2 employed a particular and distinct formula and in view of the fact that the legislature made no exception or qualification to the term "gross amount received" the term should be given the meaning already judicially given to the term "gross receipts" in Laclede Gas Company v. City of St. Louis, supra. Thus, we conclude that the "gross amount received" is the value of the trade-in plus the additional value of the cash or any other thing of value received by the merchant for the new motor vehicle. In the words of the court in Laclede Gas Company v. City of St. Louis, gross receipts are ". . . the whole and entire amount of the receipts without deduction. . . ."

In direct answer to your question then, when the merchant sells a new car the tax computed under subsection 2 is computed on the basis of what he receives for such car regardless of whether or not the amount received is other personal property.

In reaching this conclusion we have considered the question of whether or not such a situation gives rise to "double taxation." In view of the fact that the legislature has employed a distinct formula in subsection 2, as we noted, we find no valid question of double taxation. Furthermore, if a constitutional question does exist, it is for the courts to decide and does not constitute a basis for a construction by this office which would ignore the plain language used by the legislature. Gershman Investment Corporation v. Danforth, 517 S.W.2d 33 (Mo.Banc 1974).

CONCLUSION

It is the opinion of this office that under the provisions of subsection 2 of Section 150.040, RSMo Supp. 1976, the gross

amount received by the merchant for new motor vehicles is to be computed on the basis of the entire amount received from the sale of "new" motor vehicles as provided in Section 150.040(2), including the value of any trade-ins.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

BANKS:
STATE AUDITOR:
DIVISION OF FINANCE:

The proper method of allocation of costs of bank examinations is for the Commissioner of Finance to estimate expenses pursuant to Section 361.170, RSMo 1969, and add an amount equal to fifteen percent of the estimated expenses to pay the costs of rent and other supporting services furnished by the state; and from that total amount, the Commissioner shall deduct the estimated amount of the anticipated annual income to the fund from all sources other than bank or trust company assessments. Then the Commissioner of Finance shall allocate and assess the remainder to the several banks and trust companies in the state on the basis of their total assets as reflected in the last preceding report called for by the Commissioner under Section 361.130, RSMo 1969.

OPINION NO. 121

July 21, 1977

FILED
121

Honorable Thomas M. Keyes
State Auditor
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Keyes:

This opinion is in answer to your following question:

> "Is the formula currently employed by the Division of Finance for allocating annual assessments of bank examination fees in compliance with the provisions of Section 361.170 of the current revised statutes of the State of Missouri, and if not, what is the correct formula for allocating annual assessments?"

We understand that your request grows out of a concern which you have for the method of the Missouri Division of Finance in allocating certain fees under Section 361.170, RSMo 1969. This section reads as follows:

> "1. The expense of every regular and every special examination, together with the expense of administering the banking laws, including salaries, travel expenses, supplies and equipment, shall be paid by the banks

> and trust companies of the state, and for this purpose the commissioner shall, prior to the beginning of each fiscal year, make an estimate of the expenses to be incurred by the division during such fiscal year. To this, there shall be added an amount equal to fifteen percent of the estimated expenses to pay the costs of rent and other supporting services furnished by the state. From this total amount the commissioner shall deduct the estimated amount of the anticipated annual income to the fund from all sources other than bank or trust company assessments. The commissioner shall allocate and assess the remainder to the several banks and trust companies in the state on the basis of their total assets, as reflected in the last preceding report called for by the commissioner under the provisions of section 361.130. A statement of such assessment shall be sent by the commissioner to each bank and trust company on or before July first. One-half of the amount so assessed to each bank or trust company shall be paid by it to the state collector of revenue on or before July fifteenth, and the remainder shall be paid on or before January fifteenth of the next year.
>
> "2. Any expenses incurred or services performed on account of any bank, trust company or other corporation subject to the provisions of this chapter, outside of the normal expense of any annual or special examination, shall be charged to and paid by the corporation for whom they were incurred or performed." (Emphasis added)

Over the past five years or longer, the Commissioner of Finance used a formula for allocating the expense of every regular and special examination and expense of administering the state banking laws which consists of a declining, graduated scale based on the total assests of each bank. The Commissioner contends that this method is based on his discretionary powers to allocate and assess all state chartered banks under Section 361.170.

It is noted that prior to 1967 this section contained different language. Section 361.170, RSMo Supp. 1965, read as follows:

"1. The expense of every annual or special examination shall be paid by the bank, trust company or such other corporation examined in such amount as the commissioner certifies to be just and reasonable, and for the purposes of this section such institutions are hereby denominated banks.

"2. The expense shall be paid in proportion to the total assets of the bank and shall not exceed the amounts herein provided:

(1) Banks having total assets not exceeding seven hundred fifty thousand dollars, one hundred dollars plus twenty cents for each one thousand dollars or fractional part thereof of assets in excess of one hundred thousand dollars;

(2) Banks having total assets of seven hundred fifty thousand dollars or more and less than five million dollars, one hundred fifty dollars plus eighteen cents for each one thousand dollars or fractional part thereof in excess of one hundred thousand dollars;

(3) Banks having total assets of five million dollars or more and less than ten million dollars, six hundred dollars plus five cents for each thousand dollars or fractional part thereof of assets in excess of one hundred thousand dollars;

(4) Banks having total assets of ten million dollars or more, one thousand dollars plus five cents for each one thousand dollars or fractional part thereof in excess of one hundred thousand dollars.

"3. The aggregate sum collected from the banks, trust companies and other corporations shall be reckoned upon a basis sufficient to cover the entire expenses of the division, including salaries of officers and employees, traveling expenses of the commissioner, his deputy and examiners, and the

> preparation of the reports and all other expenses made necessary by this chapter.
>
> "4. Any special expenses incurred and services performed on account of any such corporation, or on account of any foreign corporation or its agency to which this chapter is applicable outside of the expense of any annual or special examination shall be charged to and paid by the corporation for whom they were incurred or performed."

This section was repealed and reenacted in the form as it appears in the first part of this opinion. The historical note under Section 361.170, V.A.M.S., states:

> "The 1967 amendment substantially revised the law, dropping the specific charges to banks and making the banks responsible for the costs of examination and of 'the expense of administering the banking laws' under a formula based on the anticipated needs of the division plus 15%, minus estimated annual income other than from banks. The remainder is assessed to the banks on the basis of their total assets, reflected in the past report of the bank, payable in semi-annual installments. Subsection 2 is substantially the same as Subsection 4 of the amended law, except the specific reference to foreign corporations which was dropped." (Emphasis added)

In construing statutes, the primary purpose is to ascertain legislative intent from the plain and ordinary meaning of the words used and objectives to be obtained. When the language is unambiguous, statutes are construed as written. The historical purpose of statutes should be considered.

By amending a statute, the legislature will be presumed not to have intended a needless and useless act. Wright v. J. A. Tobin Construction Company, 365 S.W.2d 742 (K.C.Mo.App. 1963).

Under the present law, the Commissioner makes an estimate of the expenses to be incurred by the division during a fiscal year including the expense of every regular and special examination, the expense of administering the banking laws, salaries, travel expenses, supplies, and equipment of the Division of Finance in connection with the administering of said laws. Thereafter, his discretion ends.

Upon making an estimate, there is added to the estimated amount an additional amount equal to fifteen percent of the estimated expenses to pay the costs of rent and other supporting services furnished by the state. From this total amount, the Commissioner must deduct the estimated amount of the anticipated annual income to the fund from all sources other than bank or trust company assessments. Then, the Commissoner must allocate and assess the remainder to the several banks and trust companies in the state on the basis of their total assets as reflected in the last preceding report which is to be filed as required by Section 361.130, RSMo 1969.

In light of the 1967 amendment, it is our view that the language

> ". . . The commissioner shall allocate and assess the remainder to the several banks and trust companies in the state on the basis of their total assets, . . ."

requires a simple, proportional distribution among state chartered banks and trust companies according to the percentage and relationship of their individual total assets to the collective total assets of all such banks and trust companies within the state. The language in the statute is mandatory. There appears to be no discretion in the Commissioner on the method of allocation. We note that the word "shall" is normally an indication that the statute is mandatory. State ex rel. McTague v. McClellan, 532 S.W.2d 870 (Mo.Ct.App. at St.L. 1976).

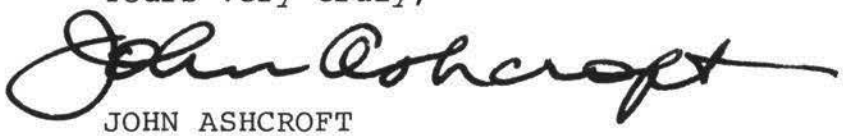
It has been urged that the construction suggested by the State Auditor causes large state chartered banks to pay more fees under Section 361.170 and small state chartered banks to pay less. While rules of statutory construction indicate that the result of a particular construction should be considered, we are mindful that the plain language of the statute cannot be ignored. The intent of the legislature appears to be that every bank subject to the law is required to pay the expenses of examination on an equitable basis which can only be done by considering the assets of each of the banks at a certain point of time. Our view of the statute is consistent with such intent. We believe that our view of Section 361.170 makes all banks responsible for the costs of examination and expense of administering the banking laws, thus giving effect to the 1967 amendment which substantially revised the law.

CONCLUSION

It is the opinion of this office that the proper method of allocation of costs of bank examinations is for the Commissioner of Finance to estimate expenses pursuant to Section 361.170, RSMo 1969, and add an amount equal to fifteen percent of the estimated expenses to pay the costs of rent and other supporting services furnished by the state; and from that total amount, the Commissioner shall deduct the estimated amount of the anticipated annual income to the fund from all sources other than bank or trust company assessments. Then the Commissioner of Finance shall allocate and assess the remainder to the several banks and trust companies in the state on the basis of their total assets as reflected in the last preceding report called for by the Commissioner under Section 361.130, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Terry C. Allen.

Yours very truly,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

May 24, 1977

OPINION LETTER NO. 122

Honorable C. E. Hamilton, Jr.
Prosecuting Attorney
Callaway County, Courthouse
Fulton, Missouri 65251

Dear Mr. Hamilton:

This letter is in response to your question asking:

> "Does the Magistrate Judge in a third class county have the authority to divide the total amount budgeted for 'Clerks' Annual Salary' among the clerk and deputies of the Magistrate Court as he wishes, if one total amount of salaries is shown on the 'General Revenue Fund, Appropriation by Organizational Unit and by Object of Expenditures' provided the total does not exceed the total amount approved as the appropriation, or must the amounts be restricted for each employee to the individual amounts shown on the 'Budget Estimates' under the Approved 1977 column? This question concerns only the amount for additional salaries or employees from the County Treasury and not that amount provided for under Section 483.490 to be paid by the State."

You also state:

> "For the 1977 annual budget for Callaway County, the Magistrate Court of Callaway County has submitted a 1977 budget estimate.

> This is as shown, attached as Exhibit A. In that estimate, all of the Magistrate clerks were listed by name and a set salary was noted for each of them. The County Clerk and County Court then reduced each of those salaries as shown in the Approved 1977 column of the Budget Estimate. At that point the County Court made up the form for 'Appropriation by Organizational Unit and by Object of Expenditures', attached as Exhibit B. On that form the Clerks' annual salaries were totaled together as $23,562.48. The amounts throughout are the amounts requested to come from county funds and are over and above the amounts that are to be paid by the State under Section 483.490 RSMo 1969. One of the Magistrate clerks has now quit her job and rather than hire an additional Magistrate Clerk, the Magistrate Judge desires to divide that salary among the remaining three Magistrate Clerks. The County Court of Callaway County has refused to do so."

In our view, your question is answered by our Opinion No. 142, dated February 21, 1967, to Rea, (copy enclosed). In that opinion we pointed out that Section 483.485, RSMo, provides with respect to such additional clerks that:

> ". . . provided, that in any county where need exists, the county court is hereby authorized, at the cost of the county, to provide such additional clerks, deputy clerks or other employees as may be required and to provide funds for the payment of salaries or parts of salaries of clerks, deputy clerks and other employees, in addition to the amounts payable by the state under section 483.490. . . ."

Thus, the county court has the sole authority to provide such additional clerks at the cost of the county.

The magistrate therefore has no authority to apportion the salary of the clerk who has resigned among the remaining magistrate clerks.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosure: Op. No. 142, 2/21/67, Rea

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

July 11, 1977

OPINION LETTER NO. 124

Honorable Nelson B. Tinnin
State Senator, District 25
Room 333, State Capitol Building
Jefferson City, Missouri 65101

Dear Senator Tinnin:

This letter is in response to your request for a ruling on the following question:

> "The question is whether or not a city ordinance in compliance with Section 311.080 is valid as against an applicant for a liquor by the drink license under Section 311.095. Does Section 311.095 set up its own standards as enumerated in Paragraph 2 to the exclusion of the remainder of Chapter 311.010, et al?"

Section 311.095, RSMo Supp. 1975, provides in pertinent part:

> "1. Notwithstanding any other provisions of this chapter to the contrary, any person who possesses the qualifications required by this chapter, and who now or hereafter meets the requirements of and complies with the provisions of this chapter, may apply for and the supervisor of liquor control may issue a license to sell intoxicating liquor, as in this chapter defined, by the drink at retail for consumption on the premises of any resort as described in the application. As used in this section the term 'resort'

means any establishment having at least forty rooms for the overnight accommodation of transient guests, having a restaurant or similar facility on the premises at least sixty percent of the gross income of which is derived from the sale of prepared meals or food, or means a restaurant provided with special space and accommodations where, in consideration of payment, food, without lodging, is habitually furnished to travelers and customers, and which restaurant establishment's annual gross food sales for the past two years immediately preceding its application for a license shall not have been less than one hundred thousand dollars per year, or means a new restaurant establishment having been in operation for at least ninety days preceding the application for such license, with a projected experience based upon its sale of food during the preceding ninety days which would exceed not less than one hundred thousand dollars per year.

"2. The bond requirements of section 311.090, the times for opening and closing the establishments as fixed in section 311.290, the authority for the collection of fees by counties as provided in section 311.220, and all other laws and regulations of the state relating to the sale of liquor by the drink for consumption on the premises where sold shall apply to resorts in the same manner as they apply to establishments licensed under section 311.090."

Section 311.080, RSMo, provides:

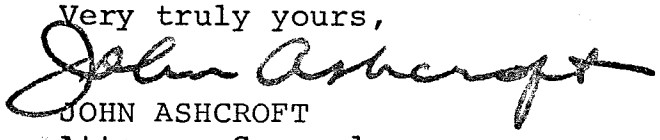
"1. No license shall be granted for the sale of intoxicating liquor, as defined in this chapter, within one hundred feet of any school, church or other building regularly used as a place of religious worship, unless the applicant for the license shall first obtain the consent in writing of the board of directors of the school, or the consent in writing of the majority of the managing board of the church or place of worship;

except that when a school, church or place of worship shall hereafter be established within one hundred feet of any place of business licensed to sell intoxicating liquor, the license shall not be denied for lack of consent in writing as herein provided.

"2. The board of aldermen, city council of other proper authorities, of any incorporated city, town or village, may by ordinance, prohibit the granting of a license for the sale of intoxicating liquor within a distance as great as three hundred feet. In such cases, and where the ordinance has been lawfully enacted, no license of any character shall issue in conflict with the ordinance while it is in effect; except, that when a school, church or place of worship is established within the prohibited distance from any place of business licensed to sell intoxicating liquor, the license shall not be denied for lack of consent in writing as herein provided."

It is our understanding that the Supervisor of Liquor Control has taken the position that applicants must be in compliance with Section 311.080 before a license will be issued under Section 311.095. It is the function of this office to provide legal counsel and legal representation for the various departments and divisions of the executive branch, including the Division of Liquor Control. We find nothing in the language of the statutes which compels the conclusion that the interpretation of the Supervisor of Liquor Control is erroneous.

Very truly yours,



JOHN ASHCROFT
Attorney General

FIREMEN: Under the provisions of Sections 87.005 and 87.006, RSMo 1969, any fireman who has complied with the provisions of these sections and succumbs to any condition of impairment of health caused by any disease of the lungs or respiratory tract, hypertension, or disease of the heart resulting in total or partial disability or death it is to be presumed that it was suffered in the line of duty unless the contrary is shown by competent evidence.

OPINION NO. 125

July 7, 1977

FILED
125

Honorable John E. Scott
State Senator, District 3
6659 Lindenwood Place
St. Louis, Missouri 63109

Dear Senator Scott:

This is in response to your request for an opinion from this office as follows:

> "After successfully passing the medical examination as prescribed by law under R.S.Mo, Chapter 87, Sections 87.005 and 87.006, if a fireman succumbs to a disabling heart or lung disease, would the disease have to be attributed to a specific emergency response, or is it presumed that this condition of impairment of health was due to exposure on the job over a period of time?
>
> "A fireman has a heart attack at the fire house or at home, but not while in the actual performance of duty. Is it presumed to have been suffered in the line of duty?"

Section 87.005, RSMo 1969, to which you refer, provides as follows:

> "1. Notwithstanding the provisions of any law to the contrary, after five years' service, any condition of impairment of health caused by any disease of the lungs or respiratory tract, hypertension, or disease of the heart resulting in total or partial disability or death to a uniformed member of a paid fire department, who successfully passed a physical examination within five years prior to the time a claim is made

> for such disability or death, which examination failed to reveal any evidence of such condition, shall be presumed to have been suffered in line of duty, unless the contrary be shown by competent evidence.
>
> "2. This section shall apply only to the provisions of chapter 87, RSMo 1959."

Section 87.006, RSMo 1969, to which you refer, provides as follows:

> "1. Notwithstanding the provisions of any law to the contrary, and only for the purpose of computing retirement benefits provided by an established retirement plan, after five years' service, any condition of impairment of health caused by any disease of the lungs or respiratory tract, hypotension, hypertension, or disease of the heart resulting in total or partial disability or death to a uniformed member of a paid fire department, who successfully passed a physical examination within five years prior to the time a claim is made for such disability or death, which examination failed to reveal any evidence of such condition, shall be presumed to have been suffered in line of duty, unless the contrary be shown by competent evidence.
>
> "2. This section shall apply to paid members of all fire departments of all counties, cities, towns, fire districts and other governmental units."

Section 87.005 was enacted by House Bill No. 143, 74th General Assembly, which was approved by the Governor on June 28, 1967, and became effective September 13, 1967.

Section 87.006 was enacted by House Bill No. 240, 75th General Assembly, which was approved by the Governor on June 27, 1969, and became effective October 13, 1969.

On February 7, 1967, this office issued Opinion No. 92 to John E. Downs, in which we stated that Section 87.045, RSMo 1959, did not authorize retirement and payment of pension to a permanently disabled fireman, whose disability resulted from an occurrence while off duty which was in no way connected with the fireman's duties. After the enactment of the above two statutes, our opinion was withdrawn.

Senator John E. Scott

In McCarthy v. Board of Trustees of Firemen's Retirement System of St. Louis, 462 S.W.2d 827 (St.L.Mo.App. 1970), plaintiff, a disabled thirty year veteran of the St. Louis Fire Department, was retired and awarded an annual pension for ordinary disabilities on the ground that he was suffering from a disabling heart condition. On December 4, 1967, before his first claim was decided, he filed a more general claim in which he claimed his heart condition was suffered in the line of duty and that he was entitled to an additional pension on the ground that his disability was service connected relying on the provisions of Section 87.005.

The evidence was that while plaintiff was fighting a fire on May 24, 1965, he fell and struck his back on the corner of a stack of shingles. He was given emergency treatment and was off work for a month complaining of soreness in his back and rib, a burning sensation in his lung, and a shortness of breath. He continued to work until April, 1967, almost two years after his accidental fall. The board of trustees of the firemen's retirement system of St. Louis denied plaintiff's claim of disability arising from accidental injury which was affirmed by the court in this case; and the court then considered his later claim that his disabling heart condition was suffered in the line of duty under the statutory presumption of Section 87.005. The court held that the statute which was enacted after the plaintiff became disabled should be applied retroactively because it prescribes a rule of evidence saying that one fact establishes a rebuttable presumption of another fact, that is, the successful passing of a physical examination within a certain time is a prima facie showing that subsequent heart disease was suffered in the line of duty. It created a procedural right, not a substantive right; and the presumption could be applied retroactively to disability benefit cases pending at the time the statute became effective.

The court then discussed a provision of Section 87.005 regarding the type of physical examination required by the statute that any member of a paid fire department who has successfully passed a physical examination within five years prior to the time a claim is made for such disability or death, which examination failed to reveal any evidence of such condition, shall be presumed to have been suffered in the line of duty, unless the contrary be shown by competent evidence. The court then set out a standard for the physical examination prescribed by Section 87.005 which must be followed for this presumption to be applied. Although plaintiff was denied retirement benefits in this case, it was not on the basis that his contention that his heart attack was suffered while in the line of duty but it was denied due to the insufficiency of the physical examination given him by the doctor prior to the time he had his heart attack.

Senator John E. Scott

In Opinion No. 47 issued by this office on February 19, 1974, to Kenneth J. Rothman (copy enclosed), in which he inquired what would constitute a proper physical examination for the purposes of House Bill No. 240 (Section 87.006), we gave our interpretation of the court decision in McCarthy v. Board of Trustees of Firemen's Retirement System of St. Louis, supra, and concluded that the same construction of the provision of Section 87.005 concerning a physical examination necessary to raise the statutory presumption should be given to House Bill No. 240 (Section 87.006).

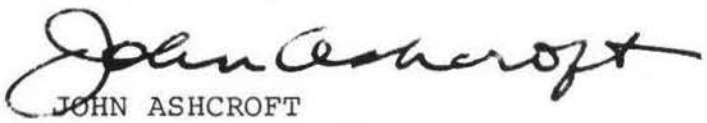
Although the appellate court in McCarthy v. Board of Trustees of Firemen's Retirement System of St. Louis, supra, denied retirement benefits to a plaintiff who claimed the heart attack suffered two years after the accident he had while actually fighting a fire, was in the line of duty, it was denied on the basis that he had not produced evidence concerning his physical examination sufficient to raise a presumption under the provisions of Section 87.005. Apparently, if his physical examination had been sufficient as required under Section 87.005 to raise the presumption, his claim for retirement benefits on the basis that he had suffered the heart attack while in the line of duty based on the presumption would have been allowed.

CONCLUSION

It is the opinion of this office that under the provisions of Sections 87.005 and 87.006, RSMo 1969, any fireman who has complied with the provisions of these sections and succumbs to any condition of impairment of health caused by any disease of the lungs or respiratory tract, hypertension, or disease of the heart resulting in total or partial disability or death it is to be presumed that it was suffered in the line of duty unless the contrary is shown by competent evidence.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosure: Op. No. 47
2-19-74, Rothman

August 23, 1977

OPINION LETTER NO. 126
Answer by Letter - Klaffenbach

FILED
126

Honorable Donald L. Manford
State Senator, 8th District
c/o Senate Post Office
State Capitol Building
Jefferson City, Missouri 65101

Dear Senator Manford:

This letter is in response to your request for an opinion asking the following questions:

> "1. May funds which are appropriated to one of the distinct departments of state government and which are designated as being 'For . . . ' a particular division or program within or administered by the department be used for payment of the expenses of any kind of another division or program regardless of whether or not the designation is itemized to any further degree?
>
> "2. Does a department director have the power to transfer funds within his departmental appropriation from one division or program to another?
>
> "3. May an appropriation made for a division or program be used to pay for the expenses of the operation of the department's central office?"

We understand your request to be of a general nature and we believe that it would be unwise and inappropriate for this office to speculate as to the various possible fact situations which may exist.

We believe, however, that there are some general principles which may be stated regarding the transfer of funds by a department head from one division or program to another in his department. These principles are subject to qualification as necessary when precise factual situations are considered.

In our Opinions No. 152-1974 and No. 349-1974, copies enclosed, we concluded that funds appropriated for a specific purpose may not be used for a different purpose. Opinion No. 152-1974 further concluded that where funds are appropriated to a division for a particular purpose that the department director, if he has been given broad authority by the General Assembly in the management of the department operations, may transfer such appropriation to another division of the department for the same purpose. The reasoning on which that conclusion was based was that the director had statutory duties given him under substantive law in handling the affairs of his department which duties were not altered by the appropriation act.

Opinion No. 152-1974 represents the view of this office only insofar as it relates to appropriations to divisions in the circumstances and factual situations set forth in such opinion and does not purport to rule on any other factual situation. Both of the enclosed opinions illustrate the difficulty that would be involved in making such rulings without considering specific situations.

As stated above, we cannot and do not rule on questions of fund transfers within a department in the absence of specific questions relating to particular statutory authority which may exist with respect to various departments and divisions of state government.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosures: Op. No. 152
3/27/74, Sikes

Op. Ltr. No. 349
11/7/74, James

May 13, 1977

OPINION LETTER NO. 127
Answer by Letter - Hyatt

Dr. Arthur L. Mallory
Commissioner of Education
State Department of Elementary and
Secondary Education
Jefferson State Office Building
Jefferson City, Missouri 65101

FILED
127

Dear Dr. Mallory:

This letter is in response to your request for our review and certification of the Department of Elementary and Secondary Education's Annual Program Plan Amendment under Part B of the Education of the Handicapped Act, as amended by Public Law 94-142 (20 U.S.C. §§ 1401 et seq., as amended).

In addition to the Education of the Handicapped Act, as amended, and regulations promulgated pursuant thereto, our review has taken into consideration Article III, Section 38(a), Article IV, Section 15, Article IX, Sections 1(a), 2(a) and 2(b), Missouri Constitution; Sections 161.092, and 162.670 to 162.995, RSMo Supp. 1975, and related provisions.

It is the opinion of this office that:

1. The Missouri State Department of Elementary and Secondary Education is the State educational agency as defined in 20 U.S.C. § 1401(7) and has authority under state law to submit the plan and to administer or to supervise the administration of the plan.

2. All plan provisions are consistent with state law.

Very truly yours,

JOHN ASHCROFT
Attorney General

COMPENSATION:
COUNTY COLLECTORS:
COUNTY TREASURERS:

Under Section 54.320, RSMo Supp. 1975, an ex officio collector is entitled to: A. Three percent commission on the collection and paying over of all current or delinquent corporation, merchants' tax, license, and tax on railroads and is entitled to a two percent commission on the collection and paying over of all other delinquent taxes. B. Three percent commission on the collection and paying of taxes of a telephone company regardless of whether the company pays on a current basis or pays delinquent taxes. Section 151.280, RSMo 1969, does not apply to the commissions of ex officio collectors; and Section 52.260 (14) and (15), RSMo 1969, did not apply to an ex officio collector.

OPINION NO. 128

August 31, 1977

FILED
128

Honorable Thomas M. Keyes
State Auditor
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Keyes:

This is in response to your opinion request. We have consolidated your request into the following questions:

> Under Section 54.320, RSMo Supp. 1975, ex officio collectors are entitled to certain commissions, what are they?
>
> What is the commission of an ex officio collector on taxes, delinquent or current, paid by a telephone company?
>
> Does Section 151.280, RSMo 1969, relating to railroad taxes and fees of county collectors apply also to the commission of ex officio collectors?
>
> Prior to the enactment of Section 54.320, RSMo Supp. 1975, did Section 52.260 (14) and (15), RSMo 1969, apply to ex officio collectors?

We understand that under Section 54.320 the ex officio collectors of counties having township organizations contend that they are authorized to charge a two percent commission on all

delinquent taxes including delinquent corporation, merchants' license, and railroad taxes and charge a three percent commission on the same delinquent taxes, making the total commission charged on all delinquencies five percent.

The statutes which are applicable to all of your questions are:

Section 54.320, RSMo Supp. 1975:

> "The county treasurer in counties of the third and fourth classes adopting township organizations shall be allowed a salary of not less than one hundred dollars per month by the county court to be paid as at present provided by law; the ex officio collector for collecting and paying over the same shall be allowed a commission of three percent on all corporation taxes, back taxes, licenses, merchants' tax and tax on railroads, and two percent on all delinquent taxes, which shall be taxed as costs against such delinquents and collected as other taxes; he shall receive nothing for paying over money to his successor in office. Other provisions of law to the contrary notwithstanding, the total compensation of ex officio collectors shall not exceed the sum of ten thousand dollars annually, which maximum amounts shall include the costs of any deputy or assistants employed; except that, in all counties wherein the total amount levied for any one year exceeds two million dollars and is less than four million dollars, the ex officio collector shall present for allowance proper vouchers for all disbursements made by him on account of salaries and expenses of his office and other costs of collecting revenue, which shall be allowed as against the commissions collected by him; and out of the residue of commissions in his hands, after deducting the amounts so allowed, the ex officio collector may retain a compensation for his services not to exceed ten thousand dollars per year; and except that, the maximum compensation herein provided shall not be applicable to ex officio collectors in counties wherein the total amount levied for any

> one year exceeds four million dollars. The limitation on the amount to be retained as herein provided applies to fees and commissions on current taxes, but does not apply to commissions on the collection of back and delinquent taxes and ditch and levee taxes. All fees or commissions received by the ex officio collector in excess of the maximum amounts provided herein to be retained as compensation shall be paid into the county treasury."

Section 137.425.1, RSMo 1969:

> "In all counties which adopt township organization, township taxes for township purposes may be levied on the taxable property in the townships for the first year following the adoption of township organization, based on the assessment made in the year for which the taxes are levied."

Section 137.475, RSMo 1969:

> "The county clerk shall cause a copy of the assessment roll of each township in their respective counties, with the taxes extended thereon, to be delivered to the collector of such township, on or before the day in each year, as fixed by law, when taxes become due, or, if the county court determines that a copy of the assessment roll is unnecessary, the clerk shall deliver the original assessment rolls with the taxes extended thereon to the collector."

Section 139.320.1, RSMo 1969:

> "To each assessment roll a warrant under the hand of the county clerk and seal of the court shall be annexed, commanding such collector to collect from the several persons named in the assessment roll the several sums mentioned in the last columns of such roll, opposite their respective names; the warrant shall direct the collector, out of the moneys collected, after deducting the compensation to which he may be lawfully entitled, to pay over

to the county treasurer the state and county tax collected by him."

Section 139.350, RSMo 1969:

"Every ex officio township collector, upon receiving the tax book and warrant from the county clerk, shall proceed in the following manner to collect the same; and he shall call at least once upon the person taxed at his or her place of residence, if in the township for which such collector has been chosen, and shall demand payment of the taxes charged to him or her, on his or her property; for which, when paid, such receipt shall be given as is provided by law."

Section 139.420.1, RSMo 1969:

"The township collector of each township, at the term of the county court to be held on the first Monday in March of each year, shall make a final settlement of his accounts with the county court for state, county, school and township taxes; produce receipts from the proper officers for all school and township taxes collected by him, less his commission; pay over to the county treasurer and ex officio collector all moneys remaining in his hands, collected by him on state and county taxes; make his return of all delinquent or unpaid taxes, as required by law, and make oath before the court that he has exhausted all the remedies required by law for the collection of such taxes." (Emphasis added)

Section 54.280, RSMo 1969:

"The county treasurer of counties having adopted or which may hereafter adopt township organization shall be ex officio collector, and shall have the same power to collect all delinquent personal property taxes, licenses, merchants' taxes, taxes on railroads and other corporations, the delinquent or nonresident lands or town lots, and to prosecute for and make sale thereof, the same that is now or may hereafter be

> vested in the county collectors under the general laws of this state. The ex officio collector shall, at the time of making his annual settlement in each year, deposit the tax books returned by the township collectors in the office of the county clerk, and within thirty days thereafter the clerk shall make, in a book to be called 'the back tax book,' a correct list, in numerical order, of all tracts of land and town lots which have been returned delinquent by said collectors, and return said list to the ex officio collector, taking his receipt therefor."

Section 151.280, RSMo 1969:

> "The county collector shall be allowed for collecting the railroad taxes, payable out of the same, one percent on all sums paid without seizure of personal property; and on all collections made by seizure of personal property, he shall be allowed five percent on the amount, which shall be taxed or charged as costs and paid by the railroad company; and on all collections made by suit against such company or companies two percent on the amount, to be paid as costs by the defendant; provided, that in all counties of class one and the city of St. Louis the collector shall pay such fees into the county or city treasury as provided by law." (Emphasis added)

In response to your first question, you have cited in your opinion request the case of State ex rel. Davidson v. St. Louis-San Francisco Ry. Co., 66 S.W.2d 149 (Mo. 1933). We have examined this case and find no subsequent cases in point on the issues in that case.

We believe that this case is significant in terms of the questions raised in this request. It should be noted that at the time this opinion was written the Missouri Supreme Court relied on sections of law which appeared in the Revised Statutes of 1929. These sections correspond to a number of sections above cited which are the current law in Missouri. Thus, we have a Supreme Court case which defines relevant sections of law which have been repealed and reenacted in this state. The relevant current section of law above described is Section 54.320 which in part says:

> ". . . the ex officio collector for collecting and paying over the same shall be allowed a commission of three percent on all corporation taxes, back taxes, licenses, merchants' tax and tax on railroads, and two percent on all delinquent taxes, which shall be taxed as costs against such delinquents and collected as other taxes; he shall receive nothing for paying over money to his successor in office. . . ."

The question today is the same as it was in 1933. What did the legislature intend when they used the words "back taxes" and thereafter used the language "delinquent taxes" in Section 54.320? In the case of State ex rel. Davidson v. St. Louis-San Francisco Ry. Co., supra at 150, the court made it clear that "back taxes" and "delinquent taxes" have the same meaning. The court went on to say:

> "We think the words 'back taxes' as used in the amended section have reference to delinquent corporation, merchant, license, and railroad taxes and that it was intended by the amendment to allow the ex officio county collectors the same commission for collecting said delinquent taxes as allowed for collecting current corporation, merchant, license, and railroad taxes. In effect, the amendment provided a commission of 2 per cent. for collecting either current or delinquent corporation, merchant, license, and railroad taxes. If so, the words 'delinquent taxes' as used have reference to the taxes returned delinquent by the township collectors. We are confirmed in this view by the separate procedure provided in the general revenue laws for the assessment and collection of taxes against railroads. . . ." (Emphasis added)

Thus, translating this judicial decision into current law, the ex officio collector is entitled to three percent commission on all collections of current corporation taxes, licenses, merchants' tax, and tax on railroads and three percent commission on collections of all delinquent corporation taxes, delinquent licenses, delinquent merchants' tax, and delinquent tax on railroads and two percent on all "other" delinquent taxes, that is, personal property taxes and real estate taxes. The ex officio collector

is not entitled to five percent commission on delinquent taxes of any nature.

We believe that this view is supported by the statutes set out above and the court decision. We note that Section 54.280 is worded similarly to Section 12312, RSMo 1929. We note that Section 151.170, RSMo 1969, and Section 151.180, RSMo Supp. 1975, are similar to Sections 11030 and 11032, RSMo 1929. Essentially, the statutory process regarding the collections of current and delinquent taxes by county collectors and ex officio collectors has not changed since 1929. Nor has the collection of certain current taxes by township collectors been changed.

In 1953, this office had occasion to consider whether an ex officio collector in a county under township organization is entitled to only two percent for collecting delinquent taxes returned by township collectors. It was the opinion of this office at that time in Opinion No. 62 issued April 25, 1953, to Miller, that the ex officio collector in counties of the third and fourth class under township organization would be entitled to a commission of only two percent with regard to collecting and paying over delinquent taxes as returned by the township collector.

Your opinion request says that ex officio collectors have been charging five percent commission on all delinquent taxes regardless of the nature for over twenty years. The argument could be made that the legislature has manifested this intent consistent with the interpretation by ex officio collectors in that there has been no substantial revisions on this issue with regard to Sections 54.280 and 54.320 over the past twenty years. However, this flies in the face of a Supreme Court case which has interpreted and declared the legislative intent.

With regard to your second question, it appears that if a telephone company pays taxes on a current basis while another telephone company pays its taxes after they become delinquent in a township organization county, the ex officio collector's commission is three percent of the tax collected and paid over. Section 54.320 appears to be abundantly clear on that point.

Regarding the collecting of current railroad taxes, you have asked whether an ex officio collector is entitled to a commission on one percent under Section 151.280 or three percent under Section 54.320. It should be noted that Section 151.280 is in regard to fees collected by county collectors. This provision of law specifically relates to the commissions or fees of a county collector, not those of ex officio collectors.

Section 54.280 vests in the ex officio collector the same power to collect delinquent taxes on railroads and to prosecute for and make sale thereof as is now vested in the county collectors under the general laws of this state. Section 54.280 makes no reference to commissions or fees of the ex officio collector. On the other hand, Section 54.320 specifically prescribes that the ex officio collector is entitled to a commission of three percent on the collection of current or delinquent taxes of railroads. This is further consistent in our view with the above-cited case of State ex rel. Davidson v. St. Louis-San Francisco Ry. Co.

With regard to your final question, you have asked whether, prior to the enactment of Section 54.320, wherein Sections 52.260 and 52.270 were repealed and reenacted with revisions, an ex officio collector was entitled to compensation under subparagraphs (14) and (15) of Section 52.260, RSMo 1969. It appears in Section 52.270, RSMo 1969, that no collector or ex officio collector in the classification indicated in subparagraphs (1) to (13) of Section 52.260 was allowed to retain commissions and fees provided thereby in any one year in excess of the specified amounts. Then in paragraph 2 of Section 52.270, RSMo 1969, reference is made to the collector of revenue in any county within the classification of subparagraph (14) of Section 52.260. The question is whether or not the words "collector of revenue" included both county collectors and ex officio collectors. Apparently, it did not include ex officio collectors. This is manifest from the changes in Section 52.270.1 and .2 in House Bill No. 265. In Section 52.270.1 the language "ex officio collector" was specifically eliminated. The maximum fees for ex officio collectors are now set out in Section 54.320. Further, in Section 52.270.2 there is no further reference or changes with regard to the words "collector of revenue." Thus, it would appear prior to the enactment of Section 54.320 that subparagraphs (14) and (15) of Section 52.260 did not apply to ex officio collectors. Moreover, it appears that whenever the state legislature desired to define collector in terms of ex officio collector, the legislature did so specifically. This is important in considering that the ex officio collector in township organization counties is the county treasurer. Thus, the legislature has been careful to make specific distinctions and references when speaking of ex officio collectors and collectors of revenue namely county collectors other than ex officio collectors.

CONCLUSION

It is the opinion of this office that under Section 54.320, RSMo Supp. 1975, an ex officio collector is entitled to:

A. Three percent commission on the collection and paying over of all current or delinquent corporation, merchants' tax, license, and tax on railroads and is entitled to a two percent commission on the collection and paying over of all other delinquent taxes.

B. Three percent commission on the collection and paying of taxes of a telephone company regardless of whether the company pays on a current basis or pays delinquent taxes.

It is the further opinion of this office that Section 151.280, RSMo 1969, does not apply to the commissions of ex officio collectors and that Section 52.260 (14) and (15), RSMo 1969, did not apply to an ex officio collector.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Terry C. Allen.

Yours very truly,

John Ashcroft

JOHN ASHCROFT
Attorney General

Enclosure: Op. No. 62
4-25-53, Miller

LEGISLATORS:
COMPENSATION: Members of the State House of Representatives who take office after the beginning of a legislative term should have their first monthly salary prorated unless they take office on the first day of the month.

OPINION NO. 129

May 25, 1977

FILED
129

Honorable Fred DeField
State Representative, District 160
Room 401, Capitol Building
Jefferson City, Missouri 65101

Dear Representative DeField:

This opinion is in response to your question asking:

> "When a member of the House of Representatives enters office at a time other than at the beginning of the legislative term, should the amount of his salary for the first month be one-twelfth of the annual salary; if not, on what basis--daily or weekly--should his salary for the first month be prorated?"

You also state:

> "Some of the members of the House of Representatives were elected at special elections and did not enter office at the beginning of the legislative term. A few representatives took their oaths and entered office during the middle of the month.
>
> "The question has now arisen under [Section] 21.140, RSMo Cumm. Supp., 1975 should these representatives receive compensation for the full month, or, a prorated amount?"

Section 21.140, RSMo Supp. 1975, provides as follows:

> "Senators and representatives shall receive from the treasury as salary the sum of eight

> thousand four hundred dollars per year. Upon certification by the president and secretary of the senate and by the speaker and clerk of the house of representatives as to the respective members thereof, the commissioner of administration shall audit and the state treasurer shall pay such compensation in equal monthly payments. Senators and representatives shall receive, weekly, a mileage allowance as provided by law for state employees, in going to their place of meeting in Jefferson City from their place of residence, and returning from their place of meeting in Jefferson City to their place of residence while the legislature is in session, on the most usual route, if the senator or representative does travel to Jefferson City during that week."

In our Opinion No. 121-A, dated February 3, 1969 to Godfrey, we interpreted the questioned provision to mean generally that senators and representatives would receive their salary in equal monthly installments. We believe that provision for the payment of compensation in the equal monthly installments, which is contained in the above section, does not apply to a representative who took the oath of office and assumed his duties during the middle of the month. The phraseology which was employed was obviously only intended to apply to legislators who served the entire month. In our view it should not be interpreted to require a month's payment for a legislator who served less than a full month. A contrary interpretation would mean that an outgoing legislator and an incoming legislator, both of whom served a part of a month, would each be paid for the full month. We are convinced that such interpretation was not intended.

We are also enclosing our Opinion No. 93, dated May 13, 1963 to Ellis, in which this office held that the salary of a circuit clerk/recorder is to be paid according to the time served by the incoming and the outgoing officeholders, so that the officeholders are paid for the exact time in office, no more and no less.

This means then, that such representatives receive compensation on a prorated basis and not for a full month.

CONCLUSION

It is the opinion of this office that members of the State House of Representatives who take office after the beginning of a legislative term should have their first monthly salary prorated unless they take office on the first day of the month.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosures: Op. No. 121-A
2/3/69, Godfrey

Op. Ltr. No. 93
5/13/63, Ellis

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

October 24, 1977

OPINION LETTER NO. 130

Honorable Wayne Goode
State Representative, 68th District
Room 410, State Capitol
Jefferson City, Missouri 65101

Dear Mr. Goode:

This letter is in response to your request for an opinion from this office asking whether subdistricts established under Sections 184.350 to 184.384, RSMo Supp. 1975 have statutory authority to exact admission charges.

You further state that the several subdistrict commissions are considering charging fees for admission to their facilities.

The said subdistricts were created and are governed under the provisions of Section 184.350 through and including Section 184.384, RSMo Supp. 1975. In construing these statutes the basic rule is to seek the intention of the legislature from the words used by giving them their usual plain and ordinary meaning so as to promote the object and manifest purpose of the statute. State ex rel. Zoological Park Subdistrict of the City and County of St. Louis v. Jordan, 521 S.W.2d 369 (Mo. 1975).

Section 184.358 provides that the subdistricts shall be governed by commissions consisting of ten members each. Subsection 1 of Section 184.360, provides:

"Each respective subdistrict is hereby empowered to own, hold, control, lease,

> acquire by donation, gift or bequest, purchase, contract, lease, [sic] sell, any and all rights in land, buildings, improvements, furnishings, displays, exhibits and programs and any and all other real, personal or mixed property for the purposes of the said subdistrict."

Section 184.360 is a general statute placing control over all the property in the hands of the commissions.

We believe the answer to the question you have submitted is found in Section 184.362, RSMo Supp. 1975, which provides in part as follows:

> "The use and enjoyment of such institutions and places, museums and parks of any and all of the subdistricts established under sections 184.350 to 184.384 shall be forever free and open to the public at such times as may be provided by the reasonable rules and regulations adopted by the respective commissions in order to render the use of the said subdistrict's facilities of the greatest benefit and efficiently to the greatest number. The respective commissions may exclude from the use of the said facilities any and all persons who willfully violate such rules. In addition said commission shall make and adopt such bylaws, rules and regulations for its own guidance and for the election of its members and for the administration of the subdistrict as they may deem expedient and as may not be inconsistent with the provisions of the law. The respective commissions may contract for, or exact, a charge from any person in connection with the use, enjoyment, purchase, license or lease of any property, facility, activity, exhibit, function, or personnel of the respective subdistricts. Said commission shall have exclusive control of the expenditures of all moneys collected by the district to the credit of the subdistrict's fund and of the construction and maintenance of any subdistrict, buildings built or maintained in whole or in part with moneys of said fund and of the supervision, care and custody of the grounds, rooms or buildings constructed,

> leased or set apart for the purposes of the subdistrict under the authority conferred in this law. . . ." (Emphasis supplied)

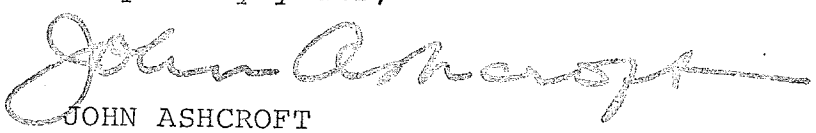
This is a special statute dealing with a particular subject. It expressly provides that the use and enjoyment of such institution and places, museums and parks of any and all of the subdistricts established under the provisions of these statutes shall be forever free and open to the public at such times as may be provided by the reasonable rules and regulations adopted by the respective commissions in order to render the use of said facilities to the greatest benefit and to the greatest number.

It is our view that it was the intention of the legislature that the general public have free use and enjoyment of the facilities at such times as may be provided under reasonable rules and regulations established by the commissions.

It is also our view that the additional provision of the statute which provides that the commissions may contract for, or exact a charge from any person in connection with the use, enjoyment, purchase, license or lease of any property, facility, activity, exhibit or function does not limit the provision requiring that the general public have free use and enjoyment of the park.

We do not speculate as to the particular activities for which the commissions may exact a charge.

Very truly yours,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

November 2, 1977

OPINION LETTER NO. 131

James F. Walsh, Director
Department of Social Services
Broadway State Office Building
Jefferson City, Missouri 65101

Dear Mr. Walsh:

This letter is in response to your question asking:

> "Does Section 198.310 preclude the Department of Social Services from expending state funds to a nursing home district where such funds are to be used in the retirement of bonded indebtedness of the district?"

You also state:

> "The Department of Health, Education and Welfare has dictated that payments to nursing homes under Title XIX Program shall be based on a cost allocation plan and one of the items to be considered is interest payments on indebtedness. The Department, through its Division of Family Services, has included in its plan the exclusion of interest payments where the nursing home has authority to recover its bonded indebtedness and interest thereon through the levying of taxes. Department of Health, Education and Welfare, based on its Title XVIII Manual which is contrary

to the above, questions the Department's authority to exclude where state funds are used."

We understand that some nursing homes are providing for the payment of indebtedness for capital expenditures out of the nursing home district operating revenues.

Under Section 198.300, RSMo, the nursing home district has certain powers. Powers that are relevant to your inquiry include: the power to establish and maintain a nursing home within its corporate limits, and to construct, acquire, develop, expand, extend and improve the nursing home. The power to acquire land in fee simple, rights on land and easements upon, over or across land and leasehold interests in land, and tangible and intangible personal property used or useful for the location, establishment, maintenance, development, expansion, extension or improvement of the nursing home. The acquisition may be by dedication, purchase, gift, agreement, lease, use or adverse possession, or by condemnation. Also relevant is the power of the nursing home to fix, charge, and collect reasonable fees and compensation for the use or occupancy of the nursing home or any part thereof, and for nursing care, medicine, attendance, or other services furnished by the nursing home.

Under the provisions of Section 198.310, RSMo, for the purpose of purchasing nursing home district sites, erecting nursing homes and related facilities and furnishing the same, building additions and repairing old buildings, the board of directors may borrow money and issue bonds. The board is required to hold an election at which qualified voters will vote for or against the loan. If two-thirds of the votes are cast for the loan, the board, subject to the restrictions of subsection 3 of Section 198.310, is vested with the power to borrow money in the name of the district to the amount and for the purposes specified on the ballot and to issue the bonds of the district for payment of the indebtedness.

Subsection 3, which was referred to, provides that the loans which are authorized shall not exceed twenty years. Subsection 3 also provides that it shall be the duty of the directors to provide for the collection of an annual tax sufficient to pay the interest on the indebtedness as it falls due and to constitute a sinking fund for the payment of the principal thereof within the time the principal becomes due.

We point out that we do not have any particular bond issue before us and therefore we are making a general statement in answer to your question without reference to any particular set of facts.

The Supreme Court of Missouri in Wunderlich v. City of St. Louis, 511 S.W.2d 753 (Mo.Banc 1974) held that the provisions of Section 26(f), Article VI of the Missouri Constitution, which has a similar requirement for the collection of an annual tax to pay indebtedness, was not violated by the City of St. Louis and its funding arrangement which was conceived for the purpose of financing the building of a convention center facility in St. Louis and which center was to be funded by operating revenue and certain specific tax levies. In that case the Missouri Supreme Court cited with approval a decision of the Supreme Court of California which held that the California debt limitation was not violated because a bond issue failed to contain a provision for an annual tax with which to pay the interest and principal of the debt. This was based on the theory that if a bond issue is made payable out of a specific and designated portion of the general funds of the city issuing the same and may never constitute a greater liability thereon, the specific and designated portion of the general funds constitutes the annual tax that is required by the constitutional debt limitation. Therefore, the sense of the Wunderlich holding was that limited obligation bonds funded from enumerated taxes approved by the electors, even though in part from operating revenues, were consistent with the provisions of the Missouri Constitution.

And, in Decker v. Deimer, 129 S.W. 936 (Mo. 1910), the Supreme Court of Missouri considering the propriety of the action of a county court in providing that surplus funds be used for the purchase of a courthouse site, stated at l.c. 948:

> ". . . Is not the building of a courthouse as legitimate as any other county purpose? Are bonds so desirable that the people of Missouri county [sic] must bond themselves when bonds are not necessary, or go without a courthouse? Must they levy special taxes when they have the means in the treasury to avoid such special levy? Running like a thread through the statutes is the idea of as low a rate of taxation as is compatible with the welfare of the people, and the other idea that the county's business must be done for cash. . . ."

Mr. James F. Walsh

We are of the view that revenues derived from "reasonable" fees charged by a nursing home district may be applied to retire bonds issued for the purchase of nursing home sites and for the erection of nursing homes under Section 198.310.

Section 26(a) of Article VI of the Missouri Constitution however prohibits the nursing home district from incurring indebtedness in any year in an amount exceeding in any year the income and revenue provided for in such year plus any unencumbered balances from previous years except as otherwise provided in the Constitution. Section 26(f) of Article VI of the Constitution is similar in context to Section 198.310 and requires that the district provide for the levy of an annual tax on all taxable tangible property therein sufficient to pay the interest and principal of the indebtedness as it falls due and to retire the same within twenty years. Therefore, while we view the application of revenue to retire bonds as proper, the district is without authority to incur indebtedness in violation of the above noted provisions of the Missouri Constitution.

Thus, only when the required bond expenditure is in excess of any expected year's revenue and unencumbered balances from previous years which can lawfully be applied to the bond obligation must the district collect an annual tax sufficient to pay the interest and principal of the indebtedness as they fall due. The amount of the annual levy may be determined by taking into consideration the income for the year and surplus, if any, at the time the levy is made which may be available, considering the other obligations of the district, for the retirement of the bond principal and interest as they become due.

It is therefore our view that Section 198.310 does not preclude the Department of Social Services from paying state funds to a nursing home district where such funds are to be used in the retirement of bonded indebtedness of the district.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

SCHOOL FOR THE BLIND:
BLIND:
DEPARTMENT OF ELEMENTARY AND
SECONDARY EDUCATION:

School for the Blind Trust Funds may be used to finance a school for the blind facility which will serve children who are sighted but who are severely handicapped as well as children who are blind.

OPINION NO. 134

September 27, 1977

FILED
134

Dr. Arthur L. Mallory
Commissioner, Department of Elementary
and Secondary Education
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Dr. Mallory:

This opinion is in response to your question asking whether the funds which are in the School for the Blind Trust Fund may be used to finance a multi-handicapped facility which we understand is to be an addition to the School for the Blind and which will serve approximately one hundred blind youngsters who have additional handicapping conditions. We are informed that "about 60% of the children served in this new program will be blind with additional handicapping conditions" and that the "additional children will be sighted but will have other multiple handicaps."

We also understand that the new facility will be a part of the total program at the Missouri School for the Blind in St. Louis; that the staff members will be responsible to the superintendent at the School for the Blind; and that certain common facilities will be shared by all students and staff. We are further advised that the new facility is being constructed on a part of the present site immediately contiguous to the existing school building.

We assume that the multi-handicapped children to which you refer come within the definition of "severely handicapped children" as defined herein.

The present section respecting the "School for the Blind Trust Fund" is Section 162.790, RSMo Supp. 1975. Such section provides in full:

"1. All funds derived from grants, gifts, donations or bequests or from the sale or conveyance of any property acquired through any grant, gift, donation, devise or bequest to or for the use of the Missouri school for the blind or income received or earned on property so acquired, at the discretion of the state board of education, may be deposited in the state treasury and credited to a special fund known as the 'School for the Blind Trust Fund', which is hereby created, or may be invested or reinvested by the state board of education for the Missouri school for the blind in bonds, stocks, deeds of trust or other investment securities in the amounts and in the proportions that the state board of education prudently selects.

"2. All funds derived from grants, gifts, donations or bequests or from the sale or conveyance of any property acquired through any grant, gift, donation, devise or bequest to or for the use of the Missouri school for the deaf or income received or earned on property so acquired, at the discretion of the state board of education, may be deposited in the state treasury and credited to a special fund known as the 'School for the Deaf Trust Fund', which is hereby created, or may be invested or reinvested by the state board of education for the Missouri school for the deaf in bonds, stocks, deeds of trusts or other investment securities in the amounts and in the proportions that the state board of education prudently selects.

"3. All funds derived from grants, gifts, donations or bequests or from the sale or conveyance of any property acquired through any grant, gift, donation, devise or bequest to or for the use of the state schools for severely handicapped children or income received or earned on property so acquired, at the discretion of the state board of education, may be deposited in the state treasury and credited to a special fund known as the 'Handicapped Children's Trust Fund', which

> is hereby created, or may be invested or reinvested by the state board of education for the respective schools in bonds, stocks, deeds of trust or other investment securities in the amounts and in the proportions that the state board of education prudently selects.
>
> "4. The moneys in the school for the blind trust fund, in the school for the deaf trust fund or in the handicapped children's trust fund shall not be appropriated for the support of the schools in lieu of general state revenues but shall be appropriated only for the purpose of carrying out the objects for which the grant, gift, donation, devise or bequest was made.
>
> "5. The state board of education shall make an annual report in writing to the governor, commissioner of administration and the general assembly, on or before the first day of February of each year in which the general assembly convenes in regular session, of all moneys in the trust funds referred to herein and of all moneys administered by it pursuant to this section. The report shall include the amount of all receipts and disbursements, the name of the depositary and investment officer, a description of the securities or other investments being administered, and the plans and projects contemplated by the state board of education for use of the moneys."

Subsections 1 and 4 of Section 162.790 clearly provide that the moneys in the "School for the Blind Trust Fund" are funds that are held in trust for the School for the Blind. Assuming that such gifts are not made for a specified use, such funds may be used for the School for the Blind. In this respect we call your attention to our Opinion No. 63, dated April 30, 1968, to Howard, in which this office stated:

> ". . . that money in the School for the Blind Trust Fund derived from conveyances to the fund which do not specify any purpose for which the funds may be used can be appropriated and expended by the Board of Education

for the purchase of land and construction of buildings for the School for the Blind if request for funds from general revenue for such purchase has resulted in an appropriation from general revenue less than the Board has requested as necessary for such purchase and that such expenditures are for the normal operation of the School for the Blind."

Section 162.730, RSMo Supp. 1975, provides:

"1. The state board of education shall establish schools or programs in this state sufficient to provide special educational services for all severely handicapped children not residing in special school districts or in other school districts providing approved special educational services for severely handicapped children which schools or programs shall be referred to herein as 'state schools for severely handicapped children'.

"2. The Missouri school for the blind at St. Louis and the Missouri school for the deaf at Fulton are within the division of special services of the department of education. The state board of education shall govern these schools.

"3. The state board of education

(1) Shall determine the type and kind of instruction to be offered and the number and qualifications of instructors and other necessary personnel in the state schools for severely handicapped children, the school for the blind and the school for the deaf; provided, however, that the course of study of these schools shall be of a character to develop the mental, physical, vocational and social abilities of the pupils and to prepare those students capable of advancing for admission to postsecondary programs;

> (2) Shall promulgate all rules and regulations governing enrollment, including that of assigning children to the most appropriate school or programs; and
>
> (3) Shall determine and approve all policies for the operation of said schools or programs."

Section 162.735, RSMo Supp. 1975, provides:

> "The state department of education may assign severely handicapped children, except severely handicapped children residing in special school districts and in districts providing approved special educational services for severely handicapped children, to state schools for severely handicapped children, the school for the blind or the school for the deaf. Futhermore, the state board of education may contract for the education of a severely handicapped child with another public agency or with a private agency when the state department of education determines that such an arrangement would be in the best interests of the severely handicapped child. Assignment of severely handicapped children under this section shall be made to a particular school or program which, in the judgment of the state department of education, can best provide special educational services, and such assignment shall be made upon the basis of competent evaluations; provided, however, the assignment may be appealed by a parent or guardian pursuant to sections 162.945 to 162.965. Children who are not residents of this state may be admitted to these schools if the schools have the capacity to receive them and upon payment of full tuition and costs as prescribed by the state board of education."

The Omnibus State Reorganization Act of 1974, subsection 4 of Section 5 provides that the transfer of the Missouri School for the Blind to the Department of Elementary and Secondary Education is a type I transfer.

Subsection (3) of Section 162.675, as amended by House Bill 130, 79th General Assembly, First Regular Session, effective September 28, 1977, defines "severely handicapped children":

> "'Severely handicapped children', handicapped children under the age of twenty-one years, who, because of the extent of the handicapping condition or conditions, as determined by competent professional evaluation, are unable to benefit from or meaningfully participate in programs in the public schools for handicapped children. The term 'severely handicapped' is not confined to a separate and specific category but pertains to the degree of disability which permeates a variety of handicapping conditions and education programs;"

It is our view that the above-quoted sections give the Department of Elementary and Secondary Education the authority to assign severely handicapped children to such schools, including the School for the Blind, as the Department deems necessary.

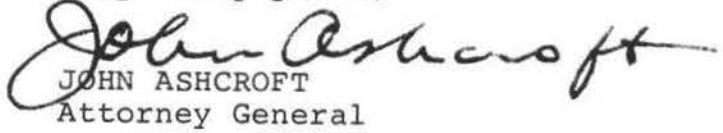
Since we have concluded that gifts of a general nature which do not contain any specific qualifications are made to the School for the Blind and since we have concluded that severely handicapped children as defined by law may be assigned to the School for the Blind, there is no legal prohibition for the use of such School for the Blind Trust Funds for the financing of a facility which is a part of the School for the Blind even though such a facility may serve children who are sighted but who are nevertheless considered to be severely handicapped.

CONCLUSION

It is the opinion of this office that School for the Blind Trust Funds may be used to finance a school for the blind facility which will serve children who are sighted but who are severely handicapped as well as children who are blind.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosure: Op. No. 63,
4/30/68, Howard

May 26, 1977

OPINION LETTER NO. 135
Answer by Letter - Hyatt

FILED
135

Dr. Arthur L. Mallory
Commissioner
State Department of Elementary
and Secondary Education
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Dr. Mallory:

In accordance with your request of May 23, 1977, we have reviewed the Missouri State Department of Elementary and Secondary Education's "Application for Federal Assistance - Migrant Education Program (fiscal year 1978)." This application is being submitted under Title I of the Elementary and Secondary Education Act of 1965, P.L. 89-10, as amended. See 20 U.S.C. Section 241c-2.

In addition to the Elementary and Secondary Education Act of 1965, as amended, and the regulations propounded pursuant thereto (45 C.F.R. 116, October 1, 1976 edition), our review has taken into consideration Article III, Section 38(a), Missouri Constitution, and Section 161.092, RSMo Supp. 1975.

Based on the foregoing, we hereby certify that the Missouri State Department of Elementary and Secondary Education has authority under state law to perform the duties and functions of a "state educational agency" as defined in Title I of Public Law 89-10 (20 U.S.C. Section 244), including those arising from the assurances set forth in the application.

This opinion letter constitutes our official certification and should be inserted in the appropriate place in each copy of the application.

Very truly yours,

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

June 10, 1977

OPINION LETTER NO. 138

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

In accordance with Section 125.030, RSMo, we have prepared a ballot title for Senate Joint Resolution No. 14, 79th General Assembly, First Regular Session. The ballot title is:

> Authorizes counties to issue utility or airport revenue bonds with voter approval; authorizes governing bodies of counties and municipalities to issue industrial development revenue bonds.

Yours very truly,

John Ashcroft

JOHN ASHCROFT
Attorney General

COUNTY COLLECTORS:
COUNTY DEPOSITARIES:

When the county court of a third class county, under Section 52.020.2, RSMo 1969, has required the county collector to deposit all daily collections of money in depositaries selected by the county courts in accordance with Sections 110.130 through 110.150, RSMo, the county collector must make such daily deposits in such county depositaries.

OPINION NO. 141

July 19, 1977

FILED
141

Honorable Eugene B. Overhoff
Prosecuting Attorney of Crawford County
P. O. Box 486
Steelville, Missouri 65565

Dear Mr. Overhoff:

This opinion is in answer to your following questions:

"Do bids received of banking corporations in answer to a public notice calling for a proposal to act as county depository for public funds pursuant to Statute 110.010 include all of the funds of the county or just those stated in another part of the invitation to bid as funds coming into the hands of the Treasurer of Crawford Co., Mo.?

"Would funds coming into the County Collector in payment of taxes etc. be a part of the public funds of the county so as to be included in the bids submitted by the banking corporations in answer to the invitation to bid?

"What are public funds of every county as designated in 110.010 and when do those funds become public funds?

"If the funds coming into the Co. collector's office are not included in the bid, can the county court, under Chap. 52.020 order the county collector to make daily deposits in the bank designated as a county depository in answer to the invitation to

> bids or must new bids be requested and received in order to cover the funds of the county collector?"

You supplied us with a copy of the invitation for bids for county depositary of Crawford County, Missouri, and indicated verbally that the county court has required the county collector to make daily deposits.

The statutes which are applicable to your question are as follows:

Section 52.020.2 provides:

> "In all third and fourth class counties the county court may require the county collector to deposit daily all collections of money in the depositaries selected by the county court in accordance with the provisions of sections 110.130 to 110.150, RSMo, to the credit of a fund to be known as 'County Collector's Fund'. The depositaries are bound to account for the moneys in the county collector's fund in the same manner as the public funds of every kind and description going into the hands of the county treasurer and shall provide security for the deposits in the manner required by section 110.010, RSMo. If daily deposits are required to be made, the county courts may also require that the bond of the county collector shall be in the sum equal to one-fourth of the largest amount collected during any one month of the year immediately preceding his election or appointment, plus ten percent of the amount. No county collector shall be required to make daily deposits for days when his collections do not total at least one hundred dollars." (Emphasis added)

Section 110.130.1, RSMo 1969, provides:

> "Subject to the provisions of section 110.030 the county court of each county in this state, at the May term, in each odd-numbered year, shall receive proposals from banking corporations or associations at the county

> seat of the county which desire to be selected as the depositaries of the funds of the county. For the purpose of letting the funds the county court shall, by order of record, divide the funds into not less than two nor more than twelve equal parts, except that in counties of the first class not having a charter form of government, funds shall be divided in not less than two nor more than twenty equal parts, and the bids provided for in sections 110.140 and 110.150 may be for one or more of the parts."

Section 110.150.1, RSMo Supp. 1975, provides:

> "The county court, at noon on the first day of the May term in each odd-numbered year, shall publicly open the bids, and cause each bid to be entered upon the records of the court, and shall select as the depositaries of all the public funds of every kind and description going into the hands of the county treasurer, and also all the public funds of every kind and description going into the hands of the ex officio collector in counties under township organization, the deposit of which is not otherwise provided for by law, the banking corporations or associations whose bids respectively made for one or more of the parts of the funds shall in the aggregate constitute the largest offer for the payment of interest per annum for the funds; but the court may reject any and all bids."

Crawford County is a third class county. Thus, Section 52.020.2 is applicable. Since the county court requires the county collector to make deposits under Section 52.020.2 daily, it is our view that collections of the county collector should be deposited in the county depositary selected under the bidding procedure employed by Crawford County pursuant to statute.

You have asked whether the invitation for bids encompasses collections made by county collectors. Our view is that these collections are public funds; and, as required by the county court under Section 52. 020.2, the collections must be deposited daily in the depositary or depositaries selected by the county court as provided by law.

It is pointed out that the matter of county collectors and county depositaries has been dealt with in a related opinion, Opinion No. 110 dated June 3, 1977 (copy enclosed), which describes the obligations of county collectors in third and fourth class counties to make daily deposits of their collections in depositaries selected by county courts.

CONCLUSION

It is the opinion of this office that when the county court of a third class county, under Section 52.020.2, RSMo 1969, has required the county collector to deposit all daily collections of money in depositaries selected by the county courts in accordance with Sections 110.130 through 110.150, RSMo, the county collector must make such daily deposits in such county depositaries.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Terry C. Allen.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Enclosure: Op. No. 110
Keyes, 6-3-77

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

June 17, 1977

OPINION LETTER NO. 145

Dr. Arthur L. Mallory
Commissioner of Education
Department of Elementary and
Secondary Education
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Dr. Mallory:

This letter is in response to your request for our review and certification of the State Board of Education's state plan for the administration of vocational education under the Vocational Education Amendments Act of 1968, as amended.

Our review has taken into consideration the Vocational Education Act of 1963, Pub.L. 88-210, as amended; the Vocational Amendments Act of 1968, Pub.L. 90-576, as amended; the Education Amendments of 1976, Pub.L. 94-482; the applicable federal regulations (45 C.F.R. Parts 100, 102, 103 and proposed rules, 45 C.F.R. Parts 104 and 105, April 7, 1977); Article III, Section 38(a), Article IV, Section 15, and Article IX, Sections 1(b), 2(a), and 2(b), Missouri Constitution; Sections 161.092, 161.112, 161.122, and 178.420 through 178.580, V.A.M.S.; Sections 5.2 and 6.7 of the Omnibus Reorganization Act of 1974; and related provisions.

It is the opinion of this office that:

1. The Missouri State Board of Education is the state agency solely responsible for the administration of vocational education in Missouri and is, therefore, the "State Board" as that term is defined in 20 U.S.C. Section 1248(8);

2. The Missouri State Board of Education has the authority under state law to submit a state plan for the administration of vocational education;

3. The Missouri State Board of Education has the authority to administer or supervise the administration of the foregoing state plan;

4. All provisions contained in the foregoing state plan are consistent with state law;

5. The Commissioner of the Missouri Department of Elementary and Secondary Education has been duly authorized by the Missouri State Board of Education to submit the foregoing state plan to the United States Commissioner of Education and to represent the Missouri State Board of Education in all matters relating thereto.

In conjunction with this letter opinion which constitutes our official certification of the application, we have completed the required certification forms.

Yours very truly,

John Ashcroft

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

December 27, 1977

OPINION LETTER NO. 147

John M. Keane, Director
Department of Labor and
Industrial Relations
421 East Dunklin
Jefferson City, Missouri 65101

Dear Mr. Keane:

This letter is issued in response to your request for an opinion on the following question:

> "To what extent may a State Plan for Public Employee Safety and Health administered by the State of Missouri provide for the coverage of both state and local government employees under existing state laws and the Constitution? Can such a program be initiated through Executive authority or will it be necessary for legislation to be enacted? If legislation is required, will all facets of the program require legislation or would, for example, it be able to provide coverage to some state and local government entities while others would require legislation? I reference you to the last sentence of 1956.2 (c)(1) which states: 'The qualification "to the extent permitted by its law" means only that where a state may not constitutionally regulate occupational safety and health conditions in certain political subdivisions, the

> plan may exclude such political subdivision employees from coverage'. As such, I will need to know which agencies fall outside the extent permitted by law."

You attached to your request a copy of the regulations 29 CSR 1956 outlining the procedures and standards for establishing such a program. § 1956.1 states:

> ". . . It is the purpose of this Part to assure the availability of the protections [the Occupational Safety and Health Act of 1970 (29 U.S.C. § 667)] to public employees, where no State plan covering private employees is in effect, by adapting the requirements and procedures applicable to State plans covering private employees to the situation where State coverage under Section 18(b) is proposed for public employees only."

The regulations clearly contemplate an extensive regulation of safety practices of public employers. Some of the necessary elements of this regulatory scheme, as envisioned by the federal regulations, are: standards must be developed which are at least as effective as those promulgated under section 6 of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 667); inspectors must have the right to enter work places and have available legal process to compel such entry if access is denied; there must be sufficient trained personnel and the state agency must have sufficient budgetary resources to adequately enforce the standards; public employers must be required to maintain records and reports on occupational injuries and illnesses; procedures must be devised for the development or promulgation of new standards or modification of existing standards so as to keep the state standards in line with the federal standards; the agency must have the authority to grant variances from the standards; the agency must have the emergency powers to deal with new and unforeseen hazards; the agency must have the power to furnish to public employees information concerning hazardous conditions in their work places; standards must provide for protection of employees from exposure to hazards by such means as protective equipment or clothing, or measuring devices; protection must be provided for employees who bring possible violations to the attention of the agency; the agency must notify employees or their representatives where the agency intends not to take compliance action; the agency must inform public employees of their protections and obligations under the act; the agency

must have procedures for the prompt restraint or elimination of any conditions or practices which could cause death or serious harm including legal proceedings to require such abatement; the agency must have the power, including compulsory legal process, to obtain necessary evidence or testimony in connection with inspection and enforcement proceedings; there must be a system of sanctions against public employers who violate state standards and orders; the agency must have a full administrative review procedure for notices of violations with opportunity for hearing; and the agency is to encourage state agencies and subdivisions to institute self-inspection and safety training programs.

It is clear that such an extensive statewide regulatory program of political entities other than state agencies could only be initiated by legislation.

Assuming such a program would be instituted by legislation, you next ask what political entities in the state could be subject to its provisions.

It is the opinion of this office that the General Assembly could, by an appropriately worded statute, extend this regulatory scheme to all political subdivisions of the state.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

September 27, 1977

OPINION LETTER NO. 148

Mr. John M. Keane
Department of Labor and
Industrial Relations
421 East Dunklin
Jefferson City, Missouri 65101

Dear Mr. Keane:

This letter is in response to your request for an opinion on the following questions:

1. "Was it the intent of the legislature to regulate theatrical booking agents in the same manner as private employment agencies are to be regulated and licensed under the new legislation; or are theatrical booking agencies covered by HB 84 solely as the result of default or oversight by the legislature in passing this legislation; or do theatrical booking agencies regulating and licensing requirements remain as they were prior to the enactment of HB 84?"

2. "Specifically, what would constitute an investigation of the character and responsibility of the owners, partners, corporate officers, stockholders and individuals responsible for the direction and operation of placement activities for an agency so as to comply with the requirement of Section 289.010.4?"

3. "In light of recent activities, and legal opinions, both official and unofficial, just how far can an investigation proceed and what documents can be looked into without violating a person's or persons' civil rights?"

Until this year, Sections 289.010 through 289.050, RSMo, regulated the licensing and operation of employment offices or agencies to obtain licenses. Such a regulatory scheme has existed in some form since 1909. Sections 289.100 through 289.130, RSMo enacted in 1963, provided additional regulations for the licensing and operation of theatrical booking agencies. Section 289.110.1 provides:

> "No person shall open, operate or maintain an office as a theatrical booking agency in this state without first obtaining a license from the director of the division of industrial inspection to operate a private employment agency as provided in section 289.010; and every licensee is subject to all of the restrictions, requirements and liabilities provided in sections 289.010 to 289.050."

In 1977, the 79th General Assembly repealed Sections 289.010 through 289.050, RSMo, and enacted in their place now Sections 289.005, 289.010, 289.020, 289.030, 289.040, 289.050, 289.060 and 289.070, HB 84, 79th General Assembly. In addition to expanding the requirements for licensing and operation of employment agencies, the new sections transfer authority for such licensing from the director of the Division of Industrial Inspection to the director of the Department of Consumer Affairs, Regulation and Licensing.

The general rule is that:

> "Where a reference statute incorporates the terms of one statute into the provisions of another act, 'the two statutes coexist as separate distinct legislative enactments, each having its appointed sphere of action.' As neither statute depends upon the other's enactment for its existence, the repeal of the provision in one enactment does not affect its operation in the other statute . . . where a statute has adopted the provision of another

> statute by reference, the suspension of the provision in one enactment does not operate to suspend the identical provision in the other statute." Sutherland, Statutory Construction Vol. 1A, Section 23.32, pp. 278-9 (4th ed. Sands, 1972).

Where one statute refers to another which is subsequently repealed, the statute repealed becomes a part of the one making the reference and remains in force so far as the adopting statute is concerned. Hanson v. City of Omaha, 61 N.W.2d 556 (Neb. Sup. 1953). This also seems to be the rule in Missouri. In Gaston v. Lamkin, 115 Mo. 20, 21 S.W. 1100, 1103 (1893), the Supreme Court held that where one statute specifically incorporates the provisions of another, those provisions will remain in force, unchanged, even though the incorporated statute may itself subsequently be amended or repealed. However, where a statute incorporates generally the established law in an area, changes in that law will become automatically a part of the incorporation. See also Crohn v. Kansas City Home Telephone Co., 131 Mo.App. 313, 109 S.W. 1068, 1070 (Mo.App. 1908).

The provisions of Section 289.110 et seq. as cited above incorporate the licensing provisions of Sections 289.010 to 289.050, as they existed at the time of enactment of Section 289.110 et seq. even to the extent of referring specifically to obtaining the license from the director of the Division of Industrial Inspection. With such a specific incorporation by reference it is the opinion of this office that any subsequent modifications and amendments to the incorporated statutory scheme would not become a part of Sections 289.110, et seq. Therefore, persons seeking to operate theatrical booking agencies must continue to obtain licensees from the director of the Division of Industrial Inspection as though Sections 289.010, RSMo et seq. had not been repealed and reenacted.

The other questions you asked cannot be appropriately answered by an official Attorney General's opinion. They involve matters which must be decided on a case-by-case basis.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

July 8, 1977

OPINION LETTER NO. 150

Mr. James R. Hall
Prosecuting Attorney
Ripley County Court House
Doniphan, Missouri 63935

Dear Mr. Hall:

This letter is in response to your question asking whether it is the duty of the prosecuting attorney in a county of the third class to represent the county collector in a suit for a refund of taxes brought under Section 139.031, RSMo Supp. 1975. You state that the question concerns an interpretation of provisions of Section 137.073, RSMo.

In answer to your question we are including the opinions listed below which we believe will be helpful to you. We are of the view in considering these opinions and the authorities cited that since the county collector is a county officer acting in the performance of his official duties in collecting taxes pursuant to the provisions of Chapter 137, RSMo, it is your official duty to defend the suit involved. This situation is somewhat similar to that in the case of Missouri Pacific Railroad Co. v. Kuehle, 482 S.W.2d 505 (Mo. 1972), in which the prosecuting attorney of Cape Girardeau County represented the collector in a suit against him for refund of alleged excess school tax payments. The school districts were also represented in that case by private counsel.

You additionally ask whether the prosecuting attorney has authority to compromise the suit. The enclosed opinions indicate that the prosecuting attorney, acting as a lawyer in the interest of the state and the county under Chapter 56, RSMo has not been given express authority to compromise such litigation. It is also our view in response to this second question that since it involves litigation it would be improper for this office to descend into details as to the manner in which the litigation should be handled.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosures: Op. No. 70, 9/14/49, Peal
Op. No. 96, 11/29/49, Wheeler
Op. No. 92, 3/5/53, Vogel
Op. No. 62, 1/11/54, Mills
Op. No. 62, 9/14/54, Jennings
Op. No. 89, 11/14/61, Toohey
Op. No. 93, 2/20/70, Crow

JOHN ASHCROFT
ATTORNEY GENERAL

Attorney General of Missouri

JEFFERSON CITY
65101

(314) 751-3321

July 7, 1977

OPINION LETTER NO. 151

Honorable Harry Wiggins
State Senator, 10th District
Room 321, Capitol Building
Jefferson City, Missouri 65101

Dear Senator Wiggins:

This letter is in response to your request for an opinion asking as follows:

> "Article VI, Section 18(e) of the Constitution of the State of Missouri (1945), relates to laws affecting charter counties. In the fourth line of the paragraph the language addresses 'the salaries of judicial officers.' My question is whether a jury commissioner is included as a 'judicial officer'?"

Section 18(e) provides:

> "Laws shall be enacted providing for free and open elections in such counties [charter counties], and laws may be enacted providing the number and salaries of the judicial officers therein as provided by this constitution and by law, but no law shall provide for any other office or employee of the county or fix the salary of any of its officers or employees."

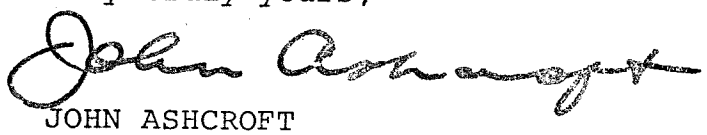
Senator Harry Wiggins

It has been said broadly with respect to the term "judicial officer", that to be a judicial officer one must be in some way connected to the judicial department. State ex rel. Heimburger v. Wells, 109 S.W. 758 (Mo. 1908). However, the Missouri Supreme Court in State v. St. Louis County, 421 S.W.2d 249 (Mo.Banc 1967), stated at l.c. 255:

> ". . . However, we think the personnel provided for the assistance of the juvenile court are not judicial officers within the meaning of Art. VI, § 18(e), but are employees of the county. Hasting v. Jasper County, 314 Mo. 144, 282 S.W. 700. . . ."

In our view the St. Louis County case, above quoted, is controlling and as a consequence a jury commissioner should not be considered to be a "judicial officer" as the term is used in such section.

Very truly yours,



JOHN ASHCROFT
Attorney General

AGRICULTURE:
AGRICULTURAL CORPORATIONS:
CORPORATIONS:

A corporation which owns agricultural land in Missouri, but does not engage in farming, is not required to file an annual report with the Director of the Missouri Department of Agriculture pursuant to Section 350.020.4, RSMo Supp. 1975.

OPINION NO. 153

August 25, 1977

FILED
153

Jack Runyan, Director
Missouri Department of Agriculture
Post Office Box 630
Jefferson City, Missouri 65101

Dear Mr. Runyan:

This is in response to your recent opinion request which poses the following question:

> "Is a corporation, being neither a family farm corporation nor an authorized farm corporation, which owns agricultural land in Missouri and leases said land to an individual, a family farm corporation, family farm unit, or another corporation, for farming purposes, required to file a yearly report pursuant to Chapter 350.020, RSMo Supp. 1975?"

Your question involves the interpretation of various sections of Chapter 350, RSMo Supp. 1975, entitled "An Act Relating to Agricultural Land; Regulating the Ownership of such Land by Certain Corporations, with Penalty Provisions." Laws, 1975, p.____, S.C.S.H.C.S.H.B. No. 655, Sections 1-5.

Section 350.015 regulates the ownership and use of agricultural land by certain corporations in Missouri. It reads as follows:

> "After September 28, 1975, no corporation not already engaged in farming shall engage in farming; nor shall any corporation, directly or indirectly, acquire, or otherwise obtain an interest, whether legal, beneficial or otherwise, in any title to agricultural

land in this state, provided, however, that the restrictions set forth in this section shall not apply to the following:

(1) A bona fide encumbrance taken for purposes of security;

(2) A family farm corporation or an authorized farm corporation as defined in section 350.010;

(3) Agricultural land and land capable of being used for farming owned by a corporation as of Septebmer 28, 1975 including the normal expansion of such ownership at a rate not to exceed twenty percent, measured in acres, in any five-year period, or agricultural land and land capable of being used for farming which is leased by a corporation in an amount, measured in acres, not to exceed the acreage under lease to such corporation as of September 28, 1975 and the additional acreage for normal expansion at a rate not to exceed twenty percent in any five-year period, and the additional acreage reasonably necessary whether to be owned or leased by a corporation to meet the requirements of pollution control regulations.

(4) A farm operated wholly for research or experimental purposes, including seed research and experimentation and seed stock production for genetic improvements, provided that any commercial sales from such farm shall be incidental to the research or experimental objectives of the corporation;

(5) Agricultural land operated by a corporation for the purposes of growing nursery plants, vegetables, grain or fruit used exclusively for brewing or winemaking or distilling purposes and not for resale, for forest cropland or for the production of poultry, poultry products, fish or mushroom farming, production of registered breeding stock for sale to farmers to improve their breeding herds, for the production of raw materials

for pharmaceutical manufacture, chemical processing, food additives and related products, and not for resale.

(6) Agricultural land operated by a corporation for the purposes of alfalfa dehydration exclusively and only as to said lands lying within fifteen miles of a dehydrating plant and provided further said crops raised thereon shall be used only for further processing and not for resale in its original form.

(7) Any interest, when acquired by an educational, religious, or charitable not for profit or pro forma corporation or association;

(8) Agricultural land or any interest therein acquired by a corporation other than a family farm corporation or authorized farm corporation, as defined in section 350.010, for immediate or potential use in nonfarming purposes. A corporation may hold such agricultural land in such acreage as may be necessary to its nonfarm business operation; provided, however, that pending the development of agricultural land for nonfarm purposes, such land may not be used for farming except under lease to a family farm unit, a family farm corporation or an authorized farm corporation, or except when controlled through ownership, options, leaseholds, or other agreements by a corporation which has entered into an agreement with the United States of America pursuant to the New Community Act of 1968 (Title IV of the Housing and Urban Development Act of 1968, 42 U.S.C. 3901-3914) as amended, or a subsidiary or assign of such a corporation; or

(9) Agricultural lands acquired by a corporation by process of law or voluntary conveyance in the collection of debts, or by any procedure for the enforcement of a lien or claim thereon, whether created by mortgage or otherwise; provided, that any corporation may hold for ten years real estate acquired

> in payment of a debt, by foreclosure or otherwise, and for such longer period as may be provided by law.
>
> (10) The provisions of sections 350.010 to 350.030 shall not apply to the raising of hybrid hogs in connection with operations designed to improve the quality, characteristics, profit ability, or market ability of hybrid hogs through selective breeding and genetic improvement where the primary purpose of such livestock raising is to produce hybrid hogs to be used by farmers and livestock raisers for the improvement of the quality of their herds."

(We note that the 79th General Assembly in its First Regular Session enacted Senate Bill No. 326, repealing Section 350.015, RSMo Supp. 1975 and replacing it with a new provision; however, the new enactment has no effect on the subject of this opinion.)

Further, Section 350.020 requires corporations either engaged in or proposing to commence farming in Missouri, to file various reports with the Director of the Department of Agriculture. Said section reads as follows:

> "1. Every corporation engaged in farming or proposing to commence farming in this state after September 28, 1975, shall file with the director of the state department of agriculture a report containing the following information;
>
> (1) The name of the corporation and its place of incorporation;
>
> (2) The address of the registered office of the corporation in this state, the name and address of its registered agent in this state and, in the case of a foreign corporation, the address of its principal office in its place of incorporation;
>
> (3) The acreage and location listed by section, township and county of each lot or parcel of land in this state owned or leased by the corporation and used for farming, and

(4) The names and addresses of the officers and the members of the board of directors of the corporation."

"2. The report of a corporation seeking to qualify hereunder as a family farm corporation or an authorized farm corporation shall contain the following additional information: The number of shares owned by persons residing on the farm or actively engaged in farming, or their relatives within the third degree of consanguinity or affinity including their spouses, sons-in-law and daughters-in-law according to the rules of the common law; the name, address and number of shares owned by each shareholder; and a statement as to percentage of net receipts of the corporation derived from any other sources other than farming.

"3. No corporation shall commence farming in this state until it has filed the report required by this section.

"4. Every corporation, except a family farm corporation, engaged in farming in this state shall, prior to April fifteenth of each year, file with the director of the state department of agriculture a report containing the information required in Subdivision 1 of this section based on its operations in the preceding calendar year and its status at the end of such year.

"5. The failure of a corporation to file a required report, or the use of false information in the report, shall be a misdemeanor for which the corporation shall be punished by a fine of not less than five hundred dollars or more than one thousand dollars."

Additionally, Section 350.025 provides: "All farm cooperatives who own farm land shall report under section 350.020 hereof."

It is clear from the facts provided with your request that the corporations you refer to are neither family farm nor authorized farm corporations, as defined by Section 350.010(2) and (5). Therefore, the questioned corporations are restricted in their

ownership and use of agricultural land by the provisions of Section 350.015. See Attorney General's Opinion No. 76, issued April 11, 1977 (copy enclosed). However, your request refers solely to the applicability of the yearly reporting provisions of Section 350.020.4 to the questioned corporations. For the reason given below, we are of the opinion that the corporations you refer to are not required to file annual reports pursuant to Section 350.020.

In construing statutory language it is essential to determine the intent and object of the legislature in enacting the statute in question by giving the words used therein their plain, rational and ordinary meaning. DePoortere v. Commercial Credit Corporation, 500 S.W.2d 724 (Mo.Ct.App. at Spr. 1973); United Air Lines, Inc. v. State Tax Commission, 377 S.W.2d 444 (Mo.Banc 1964). Where the language of the statute is plain and unambiguous, the General Assembly is presumed to have intended exactly what is directly stated in the statute. State v. Kraus, 530 S.W.2d 684 (Mo.Banc 1975); State ex rel. Zoological Park Subdistrict of the City and County of St. Louis v. Jordan, 521 S.W.2d 369 (Mo. 1975); State ex rel. State Highway Commission v. Wiggins, 454 S.W.2d 899 (Mo.Banc 1970). Further, as a general rule of construction, when statutes enumerate the things or subjects on which they are to operate, they are to be taken as excluding from their effect all subjects and things not expressly mentioned therein. DePoortere, supra; Giloti v. Hamm-Singer Corp., 396 S.W.2d 711 (Mo. 1965).

Applying these standards of interpretation to Section 350.015, it is clear that the restrictions provided therein relate both to corporations engaged in farming and corporations owning or obtaining an interest in agricultural land, as defined by Section 350.010. By its own language, Section 350.015 makes an express distinction between corporate ownership of agricultural land and corporate farming.

However, no such distinction is found in the annual reporting requirements of Section 350.020.4. The requirements therein relate solely to corporations, other than family farm corporations, engaged in farming in Missouri. Had the legislature intended to require corporations which merely own agricultural land but do not engage in farming to file annual reports pursuant to Section 350.020.4, it could have done so. In fact, in enacting Section 350.025, the legislature expressly provided that the reporting requirements of Section 350.020 apply to farming cooperatives which own agricultural land. This latter enactment would be meaningless if the legislature did not intend to distinguish between cooperative ownership of agricultural land and cooperative

farming for the purposes of Sections 350.015 and 350.020. No provision comparable to Section 350.025, relating to corporations, is found in Chapter 350. It must therefore be concluded that the annual reporting requirements of Section 350.020.4 apply to corporations only if they are engaged in farming. It is our opinion that while corporate ownership of agricultural land is restricted by Section 350.015, the corporate owner is not required to file annual reports with the Director of the Missouri Department of Agriculture pursuant to Section 350.020 unless the corporation is also engaged in farming. Thus, the answer to your question lies in whether the corporations you refer to in your request are engaged in farming.

The facts provided in your request reveal that the questioned corporations own agricultural land for nonfarming purposes, either for investment or future nonfarming business operations. In one instance, the land is leased to an individual farmer as restricted by Section 350.015(8). In neither case, however, are the corporations referred to engaged in farming; rather, they merely hold title to agricultural land for present or future nonfarming business operations. Thus, while the questioned corporations are restricted in their ownership, use, and rental of agricultural land by Section 350.015, they are not required to file annual reports pursuant to Section 350.020, since they are not engaged in farming.

CONCLUSION

It is the opinion of this office that a corporation which owns agricultural land in Missouri, but does not engage in farming, is not required to file an annual report with the Director of the Missouri Department of Agriculture pursuant to Section 350.020.4, RSMo Supp. 1975.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Greg Hoffman.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Enclosure: Op. No. 76
5/20/77, Runyan

JOHN ASHCROFT
ATTORNEY GENERAL

Attorney General of Missouri

JEFFERSON CITY
65101

(314) 751-3321

July 6, 1977

OPINION LETTER NO. 155

Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

In accordance with Section 125.030, RSMo, we have prepared a ballot title for House Joint Resolution No. 8, 79th General Assembly.

The ballot title is:

> Defines lottery to permit games of chance where nothing of value is exchanged for opportunity to participate or receive prize.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

JOHN ASHCROFT
ATTORNEY GENERAL

Attorney General of Missouri

JEFFERSON CITY
65101

(314) 751-3321

July 6, 1977

OPINION LETTER NO. 156

Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

In accordance with Section 125.030, RSMo, we have prepared the ballot title for Senate Joint Resolution No. 18, 79th General Assembly.

The ballot title is:

> Provides that redistricting of state senatorial and representative districts now performed by supreme court commissioners shall be performed by an appointed commission of appellate judges.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

June 29, 1977

OPINION LETTER NO. 157

Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

In accordance with Section 125.030, RSMo, we have prepared a ballot title for Senate Joint Resolution No. 4 of the 79th General Assembly.

The ballot title is:

> Authorizes any county having a population of at least 80,000 according to the 1970 U. S. census to adopt a charter form of government.

Yours very truly,

John Ashcroft

JOHN ASHCROFT
Attorney General

Attorney General of Missouri
JEFFERSON CITY
65101

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

June 29, 1977

OPINION LETTER NO. 158

Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

In accordance with Section 125.030, RSMo, we have prepared the ballot title for Senate Joint Resolution No. 19, 79th General Assembly.

The ballot title is:

> Changes state treasurer's duties concerning investment of state funds and authorizes legislature to require treasurer to perform other duties.

Yours very truly,

John Ashcroft

JOHN ASHCROFT
Attorney General

JOHN ASHCROFT
ATTORNEY GENERAL

Attorney General of Missouri

JEFFERSON CITY
65101

(314) 751-3321

July 6, 1977

OPINION LETTER NO. 159

Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

In accordance with Section 125.030, RSMo, we have prepared the ballot title for House Joint Resolution No. 21, 79th General Assembly.

The ballot title is:

> Permits officers established by contract between municipalities or political subdivisions to issue revenue bonds for utility, industrial and airport purposes when authorized by voters.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

September 20, 1977

OPINION LETTER NO. 161

Honorable Donald L. Manford
State Senator, District 8
1423 West 3rd
Lee's Summit, Missouri 64063

Dear Senator Manford:

This opinion letter is issued in response to your request for an official opinion concerning the applicability of Section 546.615, RSMo Supp. 1975, to a person who was convicted of an offense prior to the amendment of that section in 1971, but whose conviction was not affirmed on appeal until after the effective date of the amendment.

Subsection 1 of Section 546.615, of course, currently provides that a person convicted of a felony in this state

> ". . . shall receive as credit toward service of the sentence imposed all time spent by him in prison or jail both awaiting trial and pending transfer to the division of corrections."

Prior to its amendment in 1971, this section provided that the granting of credit for jail time was discretionary with the trial court. Section 546.615, RSMo 1969.

As previously noted, your question involves the effect of the 1971 amendment on an individual who was sentenced prior to the effective date of the amendment but whose conviction was not affirmed on appeal until after the effective date of the amendment. In connection with your request, you provide the following hypothetical statement of facts:

> An accused is convicted in April, 1971, and appeals. His conviction becomes final, i.e., affirmed on appeal in June, 1972. In the interim, Section 546.615 is revised to provide that credit for jail time is now mandatory rather than discretionary with the trial court. Question: What applicability does Section 546.615 have in relation to the conviction date vs. the date the case is affirmed on appeal?

This question was raised and resolved in State v. Whiteaker, 499 S.W.2d 412 (Mo. 1973), cert. denied 415 U.S. 949, 94 S.Ct. 1472, 39 L.Ed.2d 565 (1974). In Whiteaker, the defendant was sentenced by the trial court in January, 1971, prior to the amendment of Section 546.615. However, the case did not become final until 1973, when Whiteaker's conviction was affirmed on appeal by the Missouri Supreme Court. In its opinion, the court held that Whiteaker was entitled to all the jail time he had accumulated even though, at the time of sentencing, the granting of such jail time was discretionary with the trial court. The court concluded:

> "This court holds that section 546.615, as amended 1971, is applicable to those cases wherein the judgment has not become final prior to September 28, 1971, the effective date of section 546.615, as amended. . . ." State v. Whiteaker, supra at 421

Consequently, since you explain in your hypothetical statement of facts that the accused's conviction did not become final until June, 1972, Whiteaker would require that the individual receive credit for any jail time he might have accumulated awaiting trial or transportation to the Missouri State Penitentiary.

We note that although the United States Court of Appeals for the Eighth Circuit has ruled that Missouri's refusal to accord full retroactive effect to the 1971 amendment to Section 564.615 constitutes a denial of equal protection, King v. Wyrick, 516 F.2d 321 (8th Cir. 1975), the Missouri Supreme Court has continued to adhere to its position that Section 564.615, as amended, does not apply to individuals whose convictions became final prior to September 28, 1971. In the case of Valentine v. State, 541 S.W.2d 558, 599 (Mo. Banc 1976), the court said:

> "In 1975 the habeas corpus case of King v. Wyrick (8th Cir.) 516 F.2d 321, was decided. Therein, although defendant was held

on a first degree murder charge bail was fixed at $8,000 which defendant was unable to give because of indigency. When he pleaded guilty to murder second, the trial court refused to allow credit for jail time on the 12 year sentence. The federal appeals court held that the denial of jail time credit deprived King of equal protection and ordered that the credit be allowed.

"Obviously, this court does not agree with the King decision. In addition to other reasons that have been expressed we have the view that the trial judge in fixing the length of sentence has often considered his mental, though unannounced, decision not to allow jail credit. In the instant case we think it likely that the judge considered such in his decision to accept the very lenient recommendation of the State of a 12 year sentence for what was, in fact, three capital offenses. The Springfield District of the Court of Appeals, however, evidently considered that it should follow the King decision and it accordingly did so, without discussion, in Shepherd, supra. The court in Shepherd was not required to follow King. See, Kraus v. Board of Education of City of Jennings, 492 S.W.2d 783[2] (Mo. 1973) and cases cited therein. It was required to follow the controlling decisions of this court. Art. V, Sec. 2, Mo.Const."

Very truly yours,

JOHN ASHCROFT
Attorney General

PUBLIC SCHOOL RETIREMENT SYSTEM: TEACHERS: Under the provisions of House Bill 477 of the 79th General Assembly, effective September 28, 1977, amending Section 169.070, RSMo Supp. 1975, a member of the Public School Retirement System of Missouri with twenty-five years of creditable service, but less than sixty years of age, may retire and draw an actuarially reduced retirement allowance and the spouse named as beneficiary of a member who dies before retirement with twenty-five years of creditable service may elect to receive either survivorship benefits under option 1 of Section 169.070 as amended or a payment of the member's accumulated contributions.

OPINION NO. 163

October 20, 1977

FILED
163

Mr. Warren M. Black
Executive Secretary
Public School Retirement System
Post Office Box 268
Jefferson City, Missouri 65101

Dear Mr. Black:

This opinion is in response to your question asking as follows:

> "Under the provisions of Section 169.070 RSMo as amended by HB 477, 79th General Assembly:
>
> (1) May a member with 25 years of creditable service, but less than 60 years of age, retire and begin drawing an actuarially reduced retirement allowance?
>
> (2) May the spouse of a member who dies before retirement with 25 years of creditable service, if named as beneficiary, elect to receive Option I benefits in lieu of a refund of contributions or a survivor's benefit?"

We note first of all that House Bill 477 has been approved by the Governor and is effective September 28, 1977.

In order to illustrate the pertinent changes which were made by House Bill 477, we quote from the perfected version of the bill, which shows the matter enclosed in brackets which was

omitted from the law, and the matter underscored which was added to the law.

Section 169.060, reads in pertinent part:

> "2. On and after the first day of July next following the operative date, any member who is sixty or more years of age, and whose creditable service is five years or more, or any member whose creditable service is thirty years or more and that member has obtained fifty-five years of age, may retire upon written application to the board of trustees and receive the full retirement benefits based on his creditable service. [On and after the same date any member whose creditable service is thirty years or more and whose age is less than sixty, may retire at a reduced benefit upon written application to the board of trustees.]"

Section 169.070, reads in pertinent part:

> "3. In lieu of the retirement allowance provided either in subsection 1 or in subsection 2, a member whose age at retirement is sixty years or more or whose creditable service is [thirty] twenty-five years or more may elect in his application for retirement to receive the actuarial equivalent of his retirement allowance in reduced monthly payments for life during retirement with the provision that
>
> Option 1. Upon his death the reduced retirement allowance shall be continued throughout the life of and paid to such person as has an insurable interest in the life of the member and as the member shall have nominated in his election of the option
>
> OR
>
> Option 2. Upon his death one-half the reduced retirement allowance shall be continued throughout the life of and paid to such person as has an insurable interest in the life of the member and as the member shall have nominated in his election of the option.

> The election of option may be made only in the application for retirement and such application must be filed prior to the date on which the retirement of the member is to be effective; provided, that if either the member or the person nominated to receive the survivorship payments dies before the effective date of retirement, the option shall not be effective, except that if the member dies after attaining age sixty or after acquiring [thirty] twenty-five or more years of creditable service and before retirement, his spouse, if named as his beneficiary, may elect to receive either survivorship benefits under option 1 or a payment of his accumulated contributions.
>
> "[4. The retirement allowance of a member for early retirement whose age at retirement is less than sixty, and whose creditable service is thirty years or more shall be the actuarial equivalent of the allowance to which his creditable service would entitle him if his age were sixty.]"

The resulting context is the same as it presently appears in the truly agreed to and finally passed bill.

It is our view that subsection 3 of Section 169.070 clearly shows a legislative intent that a member whose creditable service is twenty-five years or more may elect in his application for retirement to receive the actuarial equivalent of his retirement allowance in reduced monthly payments for life and that if such a member dies after acquiring twenty-five or more years of creditable service before retirement, his spouse, if named as his beneficiary, may elect to receive either survivorship benefits under option 1 or a payment of the member's accumulated contributions. While it would have been better draftmanship for similar appropriate changes to have been made in Section 169.060 with respect to retirement of a member whose creditable service is twenty-five years or more to retire at reduced benefits upon written application to the board of trustees, we do not believe that such an omission negates the substantive changes made in subsection 3 of Section 169.070. In order to give proper effect to the legislative intent, subsection 3 of Section 169.070 must be read as giving a substantive right to those who have creditable service of twenty-five years or more to retire at reduced benefits as provided therein, and to permit such member to name his spouse as beneficiary authorizing the spouse to elect to receive either the survivorship benefits under option 1 or a payment of the member's accumulated contributions.

We believe the above answers your first question. The second question requires the determination of the effect of the failure of the legislature to amend a portion of Section 169.075, RSMo Supp. 1975, relating to survivor's benefits. That is, the pertinent portion of Section 169.075, which the legislature did not amend, provides:

> ". . . If the member's death occurs after age sixty or with thirty or more years of creditable service and before retirement, the spouse may elect, in lieu of the benefit described in this subdivision, to receive a retirement allowance computed as the joint survivor allowance designated as option 1 in subsection 3 of section 169.070 in the amount which would have been payable if the member had retired as of the date of death and at the time selected the option 1."

The question thus is whether the language of Section 169.075, which may appear to conflict with those portions of House Bill 477, which we have quoted, nullifies such conflicting provisions. House Bill 477 is, of course, the last legislative statement on the subject and therefore its plain language controls over any other conflicting provisions such as the provision cited from Section 169.075.

In construing statutes we must proceed upon the theory that the legislature intended something by the amendment to the statute. St. Charles Building & Loan Ass'n v. Webb, 229 S.W.2d 577 (Mo. 1950). Thus, where the spouse has been designated as the beneficiary under subsection 3 of Section 169.070 of House Bill 477, the spouse may elect to receive either survivorship benefits under option 1 of such section or a payment of a member's accumulated contributions despite the quoted provisions of Section 169.075, which may indicate the contrary. Additionally, this interpretation appears to be consistent with the rule of construction in Williams v. Board of Trustees of the Public School Retirement System, 500 S.W.2d 31 (K.C.Mo.App. 1973) in which the court stated that it is a recognized rule of construction that pension provisions shall be liberally construed in favor of the applicant.

Therefore, in answer to your second question, to the extent that there is any conflict between a provision of Section 169.075 and the quoted provisions of Section 169.070, as amended, the latter controls.

CONCLUSION

It is the opinion of this office that under the provisions of House Bill 477 of the 79th General Assembly, effective September 28, 1977, amending Section 169.070, RSMo Supp. 1975, a member of the Public School Retirement System of Missouri with twenty-five years of creditable service, but less than sixty years of age, may retire and draw an actuarially reduced retirement allowance and the spouse named as beneficiary of a member who dies before retirement with twenty-five years of creditable service may elect to receive either survivorship benefits under option 1 of Section 169.070 as amended or a payment of the member's accumulated contributions.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

August 23, 1977

OPINION LETTER NO. 164

Honorable Frank Bild
State Senator, 15th District
7 Meppen Court
St. Louis, Missouri 63128

Dear Senator Bild:

This letter is in response to your question asking:

> "If the voters of a fire protection district have already approved a proposition to provide emergency ambulance service within its district, and to levy a tax not to exceed five cents on the one hundred dollars assessed valuation to be used exclusively to supply funds for the operation of an emergency ambulance service, as provided in Section 321.255 RSMo, 1969, may such a fire protection district be authorized to increase the tax levy, not to exceed fifteen cents on the one hundred dollar assessed valuation, without further approval of the voters, as provided in SCS HS HB 216 and passed by the 79th General Assembly, 1977?"

Section 321.225, SCSHSHB No. 216, 79th General Assembly, as amended and effective September 28, 1977, provides:

> "1. A fire protection district may, in addition to its other powers and duties, provide emergency ambulance service within

its district if a majority of the voters voting thereon approve a proposition to furnish such service and to levy a tax not to exceed fifteen cents on the one hundred dollars assessed valuation to be used exclusively to supply funds for the operation of an emergency ambulance service. The district shall exercise the same powers and duties in operating an emergency ambulance service as it does in operating its fire protection service.

"2. The proposition to furnish emergency ambulance service may be submitted by the board of directors at the next annual election of the members of the board or at a special election called for the purpose, or upon petition by five hundred duly qualified electors of such district. A separate ballot containing the question shall read as follows:

Shall the board of directors of . . . . . Fire Protection District be authorized to provide emergency ambulance service within the district and be authorized to levy a tax not to exceed fifteen cents on the one hundred dollars assessed valuation to provide funds for such services?

☐ For emergency ambulance service and the levy

☐ Against emergency ambulance service and the levy

(Place an X in the square opposite the one for which you wish to vote.)

If a majority of the qualified voters casting votes thereon be in favor of emergency ambulance service and the levy, the district shall forthwith commence such service.

"3. As used in this section 'emergency' means a situation resulting from a sudden or unforeseen situation or occurrence that requires immediate action to save life or prevent suffering or disability."

The only change the legislature made in this section was to raise the maximum levy, which the voters can authorize, from five cents to fifteen cents. This required changes in the first paragraph with respect to the authorization to make the levy, and also in the second paragraph with respect to the proposition to be voted on by the voters.

We find no case authority in Missouri which is directly in point. However, there are several rules of construction which must be taken into consideration. Statutes which are not ambiguous do not require interpretation. However, if interpretation is required the legislative intent must be determined and if at all possible the statutes must be given prospective operation. See V.A.M.S. Construction of Statutes, Chapter 1. We believe that the statute is unambiguous, clearly reflects the legislative intent and is prospective in operation.

We think that it is beyond doubt that if the voters have authorized a tax levy not to exceed five cents on the one hundred dollars assessed valuation the five cent maximum limitation remains until the voters raise such limitation to the amount authorized by amended Section 321.225. Therefore, if it is desired to raise the maximum pursuant to the amended section, the question must be submitted to the voters for their approval.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

August 9, 1977

OPINION LETTER NO. 165

FILED
165

Mr. Lowell McCuskey
Prosecuting Attorney of
Osage County
P.O. Box L
Linn, Missouri 65051

Dear Mr. McCuskey:

This letter is in response to your question asking:

> "A conveyance of a burying ground or cemetery has been made to the County Court under the provisions of Section 214.090. Can the County Court convey the burying ground or cemetery to a not-for-profit corporation incorporated for the purpose of receiving and investing funds for the upkeep of the burying ground or cemetery."

You also state:

> "A conveyance of a burying ground or cemetery was made many years ago to the County Court under the provisions of current section 214.090 RSMo. A group of interested individuals have formed a not-for-profit corporation for the purpose of receiving and investing funds for the upkeep of the burying ground or cemetery. The not-for-profit corporation has requested the County Court to make a conveyance of the burying ground or cemetery to the not-for-profit corporation."

Section 214.090, RSMo provides:

> "Any person desirous of securing family burying ground or cemetery on his or her lands, may convey to the county court of the county in which the land lies any quantity of land not exceeding one acre, in trust for the purpose above mentioned, the deed for which to be recorded within sixty days after the conveyance; and such grounds, when so conveyed, shall be held in perpetuity as burying grounds or cemeteries for the use and benefit of the family and descendants of the person making such conveyance."

This section expressly states that the land may be conveyed to the county court and that such land will be held in perpetuity as burying grounds. We find no authority for the county court to convey this land to a private not-for-profit corporation. The general rule of law expressed in Walker v. Linn County, 72 Mo. 650 (1880) is that a county court is vested with such powers only with reference to management of the affairs of the property and business of the county as are expressly conferred on it by statute or as may be fairly or necessarily implied from those powers expressly granted. In this case, in the absence of legislative authority it seems clear that the county court has no authority to convey such property. Although an incorporated cemetery company is authorized to receive grants and bequests in trust with respect to such property under Section 214.130, RSMo, the company is not granted the power by such section to receive such land from the county court.

Very truly yours,

John Ashcroft
Attorney General

ELECTIONS:
PRIMARIES:
CANDIDATES:

Declarations of candidacy for the 1978 primary election filed after the date of the 1976 November general election (November 2, 1976) and on or before the last Tuesday in April, 1978, are valid declarations of candidacy.

OPINION NO. 166

September 27, 1977

FILED
166

Mr. C. E. Hamilton, Jr.
Prosecuting Attorney
Callaway County, Courthouse
Fulton, Missouri 65251

Dear Mr. Hamilton:

You have asked for an official opinion of this offfice on the following question:

> "Is a declaration of candidacy filed prior to the second Tuesday in January 1978 for the 1978 primary election a valid declaration or must all declarations of candidacy for the 1978 primary election be made after 8:00 A.M. on the second Tuesday in January, 1978?"

The Comprehensive Election Act of 1977 (House Bill No. 101, 79th General Assembly, approved by the Governor July 28, 1977, effective January 1, 1978) contains in § 10.100 the following provisions relative to when declarations of candidacy shall be filed:

> "1. Except as otherwise provided in sections 10.123 through 10.155, no candidate's name shall be printed on any official primary ballot unless the candidate has filed a written declaration of candidacy in the office of the appropriate election official by 5:00 p.m. on the last Tuesday in April immediately preceding the primary election.
>
> "2. Except declarations filed for nomination in the 1978 primary election before 8:00 a.m. on the second Tuesday in January, 1978,

> no declaration of candidacy for nomination in a primary election shall be accepted for filing prior to 8:00 a.m. on the second Tuesday in January immediately preceding the primary election."

Subsection 1, setting forth the latest time for filing a declaration of candidacy, is carried over without change in substance from existing law. See § 120.340, RSMo Supp. 1975. However, subsection 2, setting forth the earliest time for filing a declaration of candidacy, has no counterpart or equivalent in existing law. An opinion of the Attorney General, No. 38, December 20, 1961, Hearnes, concluded that in the absence of such an express statutory provision, the last general election preceding a primary election would mark the earliest date that declarations of candidacy could be filed. In light of the enactment of § 10.100.2 in the Comprehensive Election Act of 1977, we are now withdrawing the 1961 opinion.

Subsection 2 of § 10.100 appeared as follows in House Bill No. 101 as pre-filed on December 1, 1976:

> ". . . no declaration of candidacy for nomination in a primary election shall be accepted for filing prior to 8:00 a.m. on the second Tuesday in January immediately preceding the primary election."

The language excepting a declaration of candidacy filed before January 8, 1978, for the 1978 primary was added during the legislative deliberations on the bill and makes manifest the legislative intention that the statutory limitation on the time for filing declaration of candidacy is not applicable to filing of declarations of candidacy for the 1978 primary.

CONCLUSION

It is the opinion of this office that declarations of candidacy for the 1978 primary election filed after the date of the 1976 November general election (November 2, 1976) and on or before the last Tuesday in April, 1978, are valid declarations of candidacy.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Louren R. Wood.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

LEGISLATORS:
CONSTITUTIONAL LAW:
ARREST:

Section 19 of Article III of the Missouri Constitution, which excepts members of the Missouri General Assembly from arrest during a session of the Assembly, and 15 days prior to and after such session, does not apply to arrests which are criminal in nature and such legislators may be arrested during such sessions for criminal or ordinance violations.

OPINION NO. 169

August 12, 1977

FILED
169

Honorable Ralph Uthlaut, Jr.
State Senator, 23rd District
Rural Route 1
New Florence, Missouri 63363

Dear Senator Uthlaut:

This opinion is in response to your question asking:

> "Can a member of the Missouri Legislature be arrested for speeding, drunken driving, and other misdemeanors, (1) during a session of the Missouri General Assembly, including the 15 day period prior to and after the session; and (2) at any other time when the legislature is not in session, even if the alleged occurred during a previous legislative session."

Section 19, Article III of the Missouri Constitution, provides:

> "Senators and representatives shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest during the session of the general assembly, and for the fifteen days next before the commencement and after the termination of each session; and they shall not be questioned for any speech or debate in either house in any other place."

We note parenthetically that similar provisions are in the Missouri Constitution, Section 4, Article VIII, respecting voters, in Section 111.251, RSMo, respecting judges, clerks and voters, and in Section 491.220, RSMo, respecting witnesses. Compare

Section 41.680, RSMo, respecting the militia, Section 544.230, RSMo, officers transportating prisoners, and Section 491.430, RSMo, witness uniform attendance law.

In our Opinion No. 19, dated April 8, 1953 to Representatives Corn and Bryant, this office concluded that members of the General Assembly are privileged from arrest except for cases of treason, felony or breach of the peace during the session of the General Assembly and for the 15 days before the commencement and after the termination of each session. In that opinion we gave the phrase "breach of the peace" a narrow meaning which excluded "speeding" and "running a stop light" offenses. In addition it is stated in 12 Am.Jur.2d Breach of the Peace, Etc. §4, that there is authority for the view that not every misdemeanor is a breach of the peace, and that it is essential to show, as an element of the offense, a disturbance of public order and tranquility by acts or conduct not merely amounting to unlawfulness, but tending also to create public tumult and incite others to break the peace. However, we are presently of the view that the narrow definition of "breach of the peace" expressed in our 1953 opinion is no longer consistent with the weight of legal authority. Therefore, in view of the evolving legal authority cited below, the 1953 opinion is hereby withdrawn.

The text of 12 Am.Jur.2d §4, cited above, recognizes the fact that in some cases the term "breach of the peace" is given a very comprehensive scope, so that it includes all violations of any law enacted to preserve peace and order, or all violations of public peace or order. As authority this reference source cites as follows:

> "6. Miles v. State, 30 Okla Crim 302, 236 P 57, 44 ALR 129; State v. Christie, 97 Vt 461, 123 A 849, 34 ALR 577. See also Akron v. Mingo, 169 Ohio St 511, 9 Ohio Ops 2d 7, 160 NE2d 225, 74 ALR2d 585, holding that 'breach of the peace,' as employed in a statute excluding cases of a breach of the peace from the privilege from arrest otherwise granted to parties returning from court, embraces all criminal offenses, so that a defendant returning home after being discharged on a charge of driving while intoxicated was not immune from arrest for driving without a license and going through a red light."

A second source of general reference, Words and Phrases Volume 42A, Treason, Felony, and Breach of the Peace, 34-35, states:

> "All criminal offenses are comprehended by the terms 'treason, felony, and breach of the peace,' as used in U.S.C.A.Const. art.1, § 6, cl. 1, excepting these cases from the operation of the privilege from arrest therein conferred upon Senators and Representatives during their attendance at the sessions of their respective houses, and in going to and returning from the same. Williamson v. U.S., 28 S.Ct. 163, 166, 207 U.S. 425, 52 L.Ed. 278.
>
> "Words 'treason, felony or other crime' in U.S.C.A.Const. art. 4, § 2, subsec. 2, designating such offenses as extraditable offenses, include every offense made punishable by laws of state where committed from highest to lowest, including misdemeanors, statutory crimes, and acts made crimes by statute at any time after adoption of Federal Constitution and enactment of extradition law. State v. Taylor, 22 S.W.2d 222, 224, 160 Tenn. 44."

A third source of general authority can be found at Scurlock, Arrest in Missouri, 29 U. Kansas City Law Review, 117 (1961). At pages 131-133, Professor Scurlock states:

> ". . . The uncertainty lies in the meaning of the words 'breach of the peace.' They can signify a disturbance of the public tranquility as in the misdemeanor of disturbing the peace but they may be taken also in a broader sense. The United States Supreme Court has given to the phrase in the Federal Constitution the significance of public offense so that the whole exemption must be read: except treason, felony and misdemeanor--thus confining the immunity to civil arrest. [Williamson v. United States, 207 U.S. 425 (1907)]. This accords with the English interpretation of the 'Immunity of Parliament' from which the legislators' immunity is derived and gives to 'breach of the peace' much the same meaning as the contra pacem domini regis of the common law indictment. Since an ordinance violation is also a public offense, although prosecution of the offense is in the nature of a civil proceeding, no immunity should exist in respect to such an arrest either. [See In re Emmett, 120 Calif. App. 349, 7 P.2d 1096 (1932) sustaining the

> arrest of a state legislator for crossing a street against the traffic in violation of an ordinance.] The Missouri Supreme Court has not interpreted the phrase 'breach of the peace' in the Missouri Constitution and statutes, but it may be safely assumed that court will not deviate from the United States Supreme Court's construction. In Schwartz v. Dutro, [298 S.W. 769 (Mo. 1927)] in considering the immunity from arrest of a suitor, which is not covered by the statute, the Missouri Supreme Court quoted from Ruling Case Law to the effect that the immunity of witnesses and parties exists only as to arrest on civil process. There is no reason to believe that 'breach of the peace' does not have the same meaning in each of the contexts in which it is used."

In the Missouri case of Schwartz v. Dutro, 298 S.W. 769 (Mo. 1927), a case involving the privilege of witnesses under Section 491.220, RSMo, which is cited by Professor Scurlock, the Missouri Supreme Court stated at l.c. 771:

> ". . . The cases of Person v. Grier, 66 N.Y. 124, 23 Am.Rep. 35, and In re Healey, 53 Vt. 695, 38 Am.Rep. 713, are also distinguishable from the case in hand by the fact that the privilege there allowed was freedom from service of civil process and not immunity from criminal arrest. This distinction is generally recognized, and is well stated in 2 R.C.L. 479, thus:
>
> "'Parties and witnesses attending in good faith any legal tribunal which has power to pass upon the rights of the persons attending its sessions are privileged from arrest on civil process during their attendance and for a reasonable time in going and returning; but the exemption exists only as to arrest on civil process, and the courts do not recognize any similar privilege from arrest on a criminal charge.'"

The case which has been most frequently cited for the holding that the terminology in question covers all crimes is Williamson v. United States, 207 U.S. 425, 28 S.Ct. 163, 52 L.Ed. 278 (1908) in which the United States Supreme Court held that the words "treason, felony and breach of the peace" as used in Section 6 of Article I of the United States Constitution with respect to congressional immunity confined the privilege to arrest in civil cases.

That case is cited with consistency by the courts dealing with various constitutional and statutory provisions.

Recently, in People v. Flinn, 362 N.E.2d 3 (1977) the Appellate Court of Illinois, Fifth District, upheld the conviction of a state legislator who was ticketed by a state highway patrolman for speeding while returning home from legislative business. The court found the legislator guilty of a breach of the peace within a similar constitutional provision exempting legislators from arrest. The court held that the limiting clause "treason, felony or breach of the peace" has its roots in English legal history where it was used to express an exception to the parliamentary privilege from arrest so as to exclude from the operation of that privilege all criminal arrests. Therefore, the court concluded that traffic violations fall within the phrase "breach of the peace" since such violations lead to disorder and endanger the lives and security of the people of the state.

In reaching this conclusion the Illinois Court, after quoting the Constitution of the United States which contains an analogous provision, stated:

> ". . . Cases interpreting the exception have held that the framers of the United States Constitution intended to exclude all crimes from the protection afforded by the privilege. (Williamson v. United States (1908), 207 U.S. 425, 28 S.Ct. 163, 52 L.Ed. 278; Long v. Ansell (1934), 293 U.S. 76, 55 S.Ct. 21, 79 L.Ed. 208; see also United States v. Brewster (1972), 408 U.S. 501, 92 S.Ct. 2531, 33 L.Ed.2d 507.) Cases construing analogous language in state constitutions have also held that the exception effects an exclusion of all crimes from operation of the privilege. See Swope v. Commonwealth (Ky. 1964), 385 S.W.2d 57; Ex parte Emmett (1932), 120 Cal.App. 349, 7 P.2d 1096."

As noted above, the Illinois Court relied upon the holdings of the United States Supreme Court, the Court of Appeals of Kentucky and of the District Court of Appeals, Third District of California for the conclusion that the exception of "treason, felony, breach of the peace", the parliamentary privilege from arrest enjoyed under the Constitution by members of the General Assembly, excludes all crimes from the operation of the privilege.

In Ex parte Emmett, 7 P.2d 1096 (1932), the District Court of Appeals, Third District of California, considered the arrest

of a legislator who resisted arrest for a traffic violation on the grounds that he was not subject to such arrest under the state constitution. Although the legislator resisted the arrest on the basis of his purported constitutional privilege, the charge that was brought against him was for battery. The case is noteworthy not only for its principal holding, which we have stated, but also because the court held that the violation of a city traffic ordinance was a public offense. This case thus formed the basis for the statement made by Professor Scurlock in his article quoted above, that an ordinance violation is also a public offense, and although prosecution of the offense is in the nature of a civil proceeding, no immunity should exist.

Likewise, in City of Akron v. Mingo, 160 N.E.2d 225 (1959), noted above, in which the appellant was convicted in municipal court on a charge of driving an automobile through a red light and for not having a driver's license, the Supreme Court of Ohio held that similar Ohio statutes granting privilege from arrest to parties, witnesses, attorneys and certain other officers of the court, while going to, attending, or returning from court, granted only privilege from civil arrest and not privilege from arrest for crimes or misdemeanors.

Also, in State v. Murray, 205 A.2d 29 (1964), the Supreme Court of New Hampshire held that where a national guardsman was stopped by a police officer and issued a summons to appear before municipal court to answer a speeding charge, there was no "arrest" within the New Hampshire statutes giving national guardsmen privilege from arrest and therefore the prosecution for speeding was not subject to dismissal. The statute in that instance provided that members of the national guard were, except for treason, felony and breach of the peace, privileged from arrest and imprisonment while under orders in the active service of the state from the date of the issuing of such orders to the time when such service ceases or while going to, remaining at, or returning from any place of which the guardsmen may be required to attend military duty. The court also found there was no arrest in view of the fact that the guardsman was not taken into custody but was merely issued a summons. The definition of arrest as set out in the New Hampshire statutes followed the usual meaning of the term, similar to the definition of arrest in Missouri, Section 544.180, RSMo, in that it constitutes the taking of a person into custody in order that he may be forthcoming to answer for a commission of a crime. As we indicated, however, the charge was based on a municipal ordinance violation and not a state misdemeanor violation, but was nevertheless found to be within the scope of the exception to the privilege. The court stated that it failed to see how the action taken by the officer and the fact that

defendant was required to answer to a speeding charge at a later date would result in interference with his duties as a national guardsman.

In Edwards v. District of Columbia, 68 A.2d 286 (1949) the Municipal Court of Appeals for the District of Columbia held that the District of Columbia Code providing that no person on the Lord's Day shall serve or execute or cause to be served or executed a writ, process, warrant, order, judgment or decree, except in cases of treason, felony or breach of the peace, does not prohibit service of execution of writs and processes on Sunday in criminal cases. See also, Commonwealth v. Magaro, 103 A.2d 449 (1954) in which the Superior Court of Pennsylvania reached a similar conclusion.

It is our view that the clear preponderance of legal authority compels and requires us to conclude that a member of the Missouri Legislature is not privileged from criminal arrest under the provisions of Section 19 of Article III of the Missouri Constitution. The authority cited above compels this conclusion notwithstanding our deep concern that no legislator ever be impeded in his efforts to attend a legislative session. We conclude also, that although a prosecution for a violation of a city ordinance is not a criminal proceeding but a civil one in Missouri and in many other states, the weight of authority indicates that Missouri legislators are not privileged from arrest under Section 19, Article III for ordinance violations since ordinance violations are clearly offenses against the public.

CONCLUSION

It is the opinion of this office that Section 19 of Article III of the Missouri Constitution, which excepts members of the Missouri General Assembly from arrest during a session of the Assembly, and 15 days prior to and after such session, does not apply to arrests which are criminal in nature and such legislators may be arrested during such sessions for criminal or ordinance violations.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

September 27, 1977

OPINION LETTER NO. 172

Honorable Dotty Doll
Representative, District 29
5400 Rockhill Road
Kansas City, Missouri 64110

Dear Representative Doll:

You have requested an official opinion of this office on the following question:

> "Does Missouri's Safety Glazing Act, 701.010 et seq. RSMo apply to 'jalousie' doors and is Missouri pre-empted from enforcing this law as to 'jalousie' doors by reason of conflicting Federal regulations?"

The Missouri law to which you refer and which became effective on January 1, 1977, states in material part:

> "It is unlawful for any person, firm, or corporation to sell or offer to sell for use in this state any sliding glass doors, including both fixed and closed panels, storm doors, shower doors, bathtub enclosures, interior and exterior framed or unframed glass entrance or exit doors made of material other than safety glazing material . . ."
> § 701.015.3, RSMo Supp. 1976.

Safety glazing material is that ". . . which is so constructed, treated or combined with other materials as to minimize the likelihood of cutting and piercing injuries resulting from human contact with the glazing material." §701.010(2).

Violation of the law is declared a misdemeanor. § 701.020. The law does not assign responsibility for its enforcement to any particular state agency nor provide for the adoption of implementing rules and regulations.

It would seem that a jalousie door is included within the broad descriptive language "interior and exterior framed or unframed glass entrance or exit doors" and is thus subject to the Missouri law. The Consumer Product Safety Act, 15 U.S.C.A. §§ 2051, et seq. (1972) contains these provisions:

> "(a) The Congress finds that--
>
> * * *
>
> (4) control by State and local governments of unreasonable risks of injury associated with consumer products is inadequate and may be burdensome to manufacturers;
>
> * * *
>
> (6) regulation of consumer products the distribution or use of which affects interstate or foreign commerce is necessary to carry out this chapter.
>
> * * *
>
> "(b) The purposes of this chapter are--
>
> * * *
>
> (3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; . . ." 15 U.S.C.A. § 2051.
>
> "(a). . . (1) The term 'consumer product' means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; . . ." 15 U.S.C.A. § 2052.

> "(a) The [Consumer Product Safety] Commission may by rule, . . . promulgate consumer product safety standards. . . ."
> 15 U.S.C.A. § 2056.

> "(a) It shall be unlawful for any person to--
>
> (1) manufacture for sale, offer for sale, distribute in commerce, or import into the United States any consumer product which is not in conformity with an applicable consumer product safety standard under this chapter;"
> 15 U.S.C.A. § 2068.

> "(a) Whenever a consumer product safety standard under this chapter is in effect and applies to a risk of injury associated with a consumer product, no State or political subdivision of a State shall have any authority either to establish or to continue in effect any provision of a safety standard or regulation which prescribes any requirements as to the performance, composition, contents, design, finish, construction, packaging, or labeling of such product which are designed to deal with the same risk of injury associated with such consumer product, unless such requirements are identical to the requirements of the Federal standard."
> 15 U.S.C.A. § 2075.

The Consumer Product Safety Commission has adopted a standard for glazing materials manufactured after July 6, 1977. 16 C.F.R., Part 1201. The safety requirements imposed by this standard relate to glazing materials in:

(1) Storm doors or combination doors.

(2) Doors.

(3) Bathtub doors and enclosures.

(4) Shower doors and enclosures.

(5) Glazed panels.

(6) Sliding glass doors (patio-type).

The standard specifically exempts, among other things, the operating vents or louvers of jalousie doors from its requirements. 16 C.F.R. § 1201.1.

The reasons given by the Commission for this exemption appear to be that the increased cost of the product would not be justified by the safety benefit to the consuming public resulting from imposition of the requirements of the standard. 42 Federal Register 1431 (January 6, 1977). The Commission also expressed the view "that the preemption provisions of the Consumer Product Safety Act [15 U.S.C.A. § 2075(a)] would not apply to those products exempted from the scope of this standard by § 1201.1(c)." 42 Federal Register 1440.

Because of the Consumer Product Safety Commission's position that there is no Federal preemption of state regulation of consumer products that it has exempted from its glazing materials safety standard, it is our view that the safety requirements of §§ 701.010-701.020, RSMo Supp. 1976 are in force and effect as to glazing materials in jalousie doors sold or offered for sale in this state after January 1, 1977.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

September 27, 1977

OPINION LETTER NO. 173

Honorable Wendell Bailey
State Representative, District 152
312 East Fourth Street
Willow Springs, Missouri 65587

Dear Representative Bailey:

This is in response to your request for an opinion which reads as follows:

> "On June 2, 1977, the State Board of Education, through arbitration as authorized by Section 162.431 RSMo., detached a certain tract of land from Fairview R XI district of Howell County and attached this tract of land to the West Plains R VII school district.
>
> "Which of these school districts should receive the school tax moneys collected on real and personal property for the current FY 77-78 school year?"

The answer to your question depends on, (1) when the boundary change became effective, and (2) when the 1977-1978 school taxes were validly levied.

According to Section 162.431.4, RSMo Supp. 1975, when a board of arbitration decides that the boundaries of the school districts shall be changed, the chairman of the board of arbitration transmits the decision to the secretary of each district

affected who enters a decision upon the records of his district. The statute provides that the boundaries "shall thereafter be in accordance with the decision of the board of arbitration." [Here the secretary of each district was notified of the decision on June 2, 1977. Therefore, the boundary change became effective as of that date.]

The statutory procedure for levying school taxes requires the school board to prepare an estimate of the tax rate required to produce the amount of money needed for the ensuing school year and to forward the estimate to the county clerk on or before July 15. Section 164.011, RSMo Supp. 1975. The clerk then extends the amount so returned against all taxable property in the district. Section 164.041, RSMo Supp. 1976. In the present case the West Plains R-VII School District certified its levy to the clerk July 13, 1977, and Fairview R-XI certified its levy July 15, 1977.

Where the boundary change becomes effective before the taxes are levied and assessed, the words of the statute entitle the annexing district to levy at its rate and collect the taxes from the tract.

Prior Attorney General Opinion No. 96, March 22, 1956, Wheeler, provides support for this conclusion. That opinion discussed the scope of the rights and duties of the old and new school districts in a situation where extension of city limits changed the boundaries of a school district. Although the statute there being construed provided that the change would not take effect until the following July, the opinion concluded that the intention of the legislature in providing for the effective date of July 1, was:

> ". . . that in the conduct of the schools the districts should continue as they are for the current year and in the transaction of the current year's business, but as far as preparation for the coming school year and the adjustment and opportionment of the property and obligations of the several districts, the change in boundaries should be considered in effect as of the date of the vote or decree extending the boundaries of the city or town."

Therefore, it is our view that when a parcel of land is transferred from one school district to another and the boundary

change becomes effective before the school taxes for the ensuing year have been validly levied and assessed, the annexing district is entitled to apply its tax rate to and collect the taxes on the annexed tract.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

December 13, 1977

OPINION LETTER NO. 174

Honorable Garnett A. Kelly
Representative, District 143
Route 2
Norwood, Missouri 63261

Dear Representative Kelly:

This letter is in response to your question asking as follows:

> "Under the terms and conditions of House Bill 224 as passed by the 1st Regular Session of the 79th General Assembly, does the City of Mountain Grove, Mo., have any legal right to sell any of the buildings on said property?"

The legislation to which you refer was effective September 28, 1977. It authorizes the Governor to convey to the City of Mountain Grove of Wright County, Missouri, "for public use," title to certain lands consisting of property formerly occupied by the State Poultry Experiment Station described particularly therein.

Section 2 of the bill provides:

> "The instrument of conveyance shall contain a reversionary clause providing that in the event that the city of Mountain Grove no longer desires to utilize or hold title to such property, the city shall not be permitted to convey title to any third party and the title shall then revert to and vest in the governor of the state of Missouri."

An instrument of conveyance drawn to meet the requirements of the bill would create a defeasible fee.

We understand from the city attorney, Mr. John W. Bruffett, of Ava, Missouri, that there are about twenty-seven buildings which are to be razed, such buildings largely being approximately 12 x 12 feet square with generally sloping roofs and on concrete slab foundations. We understand that these buildings were formerly used as poultry experimental buildings. We have in our file four pictures each being identified and marked as exhibits. We understand such pictures are representative of the buildings which are to be razed.

We further understand that it is the city's desire that the buildings be auctioned on the site of the real estate where now located and that hopefully enough money will be received from the sale of the buildings to recover the cost of removing the concrete slab foundations of some of the buildings.

We further understand that the primary reason for removing the structures as described is to provide the best possible usage of the real estate and that it is the goal of the city that part of the land will be available for rent to a private not for profit corporation which will construct a nursing home serving a wide area of Missouri and Arkansas and that the removal of the structures described will permit better usage of the land for parking and storage areas. The expected proceeds from the sale are relatively small and presumably it will cost the city as much as received from the sale or more to dispose of the buildings' concrete slabs. It is argued by the city that the city will never utilize the buildings in the poultry business and that the removal of the buildings will provide for maximun present and future utilization of the real estate, that the value of the land will be increased by the removal of the buildings and that the increase in the value of the real estate will increase the value of the estate remaining in the State of Missouri.

From the facts presented to us, we believe it is unnecessary to determine whether or not the removal of the buildings will constitute waste or whether or not waste as respects this property would cause a reverter or simply be the subject of a suit for monetary damages.

We believe that the removal of the buildings, as described, would be acceptable and in accordance with the legislative intent in enacting House Bill 224; and, therefore, we see no conflict between the proposed action of the city in removing and selling these buildings and the legislative purpose in restricting the use of the property.

There is, however, a question which is raised by the statement that the city apparently intends that other buildings on the land will be available for rent to a private corporation. In this respect, we wish to caution the city that the conveyance is expressly "for the use of the city of Mountain Grove . . . for public use". The reversionary clause which must be contained in the instrument of conveyance, consistent with the express provisions of House Bill 224, will provide that in the event the city of Mountain Grove no longer utilizes or holds title to such property for public use, the title shall then revert to and vest in the Governor of the State of Missouri.

We note that Ballentine's Law Dictionary, 1948 Ed., p. 1050, states with respect to the definition of the term "public use":

> "A use to which all persons have an equal right, in common, and upon the same terms, however few the number who may avail themselves of it. It is not essential to a public use that its benefits should be received by the whole public, or even a large part of it, but they must not be confined to specified privileged persons."

Thus it appears that the lease of the property to a private corporation, even a not for profit corporation, assuming such leases are otherwise possible under the statutes as respects other property generally held by the city, would in any event not be for a "public use" or a utilization of such property by the city as required by the legislature in authorizing such conveyance.

We do not attempt to determine here whether the city has authority to enter into such a lease.

Therefore, while it is our view that the razing of the buildings as described would not be inconsistent with the legislative purpose in authorizing such conveyance to the city, the leasing of such property or any part thereof for private purposes would be contrary to the requirement that the conveyance is for "public use." Thus it is our view that the conveyance of such leasehold interests would cause a reverter under House Bill 224.

Under these circumstances, it would be inappropriate for this office to approve the conveyance of the property to the city of Mountain Grove.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

MAGISTRATES:
ELECTIONS:

Under the amendments to Article V of the Missouri Constitution, effective January 2, 1979, the chief clerk of the magistrate court of Greene County elected under Section 483.495, RSMo Supp. 1975, becomes the chief clerk of divisions of the circuit court presided over by the associate circuit judges who were judges of the magistrate court on January 1, 1979. Unless otherwise provided for by law, there will be elected a chief clerk of the Greene County magistrate court at the November General Election, 1978, and the county clerk of Greene County is required to accept declarations of candidacy for such office.

OPINION NO. 176

September 28, 1977

FILED
176

Mr. Theodore L. Johnson, III
Greene County Counselor
1002 Plaza Towers
Springfield, Missouri 65804

Dear Mr. Johnson:

This opinion is in response to your question asking:

> "Section 483.495 RSMo 1976 Supplement provides for, 'a chief clerk of the magistrate court who shall be elected by the qualified electors of the county at the general election of the year 1958, and every four years thereafter, and who shall serve until his successor is duly elected and qualified'. The provisions of Article 5, Section 27, of the Missouri Constitution as amended by the voters of this State on August 3, 1976, eliminate the magistrate courts from the judicial system.
>
> "Will the office of the clerk of the magistrate court required in the section cited above be abolished as of January 2, 1979? If so, is the County Clerk required to accept declarations of candidacy for this office, and does this office have to appear on the November 1978 ballot since no apparent duties

> are to be performed on January 1, 1979 that could not be performed by the present occupant of the office and since he would continue to serve under the provisions of subsection 2, 483.495 and since no provision is made in the Statutes to elect a clerk of the magistrate court to a term of less than four years?"

You also state:

> "The passage of the Constitution Amendment restructuring the Judicial Department and abolishing the magistrate court does not deal with the unique problem created by an elected magistrate clerk. Attorney General's Opinion No. 23, issued on May 18, 1977, concerning the Court of Common Pleas for Cape Girardeau County would seem to apply to the question concerning the abolition of this office as of January 2, 1979, however, this does not approach the question of filing for, or election to the office of magistrate clerk for the one day of the new term on which duties could possibly be performed. If the office is to be abolished many problems could be created by allowing a person to be elected and sworn into that office. (i.e. City of St. Louis v. Whiteley, 283 S.W.2d 490 (Mo. 1955))."

Subsection 10.a.3 of Section 27 (the Schedule) of the constitutional amendments to Article V, effective January 2, 1979, provides in pertinent part as follows:

> "In any division of the circuit court presided over by an associate circuit judge, in the probate division of the circuit court, and in any division presided over by a municipal judge, the clerks and their deputies of the respective divisions shall continue to be selected in the same manner as provided for by law on the effective date of this article until otherwise changed by law."

In our Opinion No. 23, dated May 18, 1977, to Smith, this office concluded that the office of the clerk of the Cape Girardeau

Court of Common Pleas will be abolished as of January 2, 1979, when the amendment to Article V becomes effective. You have a copy of that opinion and therefore we have not enclosed it.

Under Section 4.c of the Schedule, magistrates who are in office on the effective date of the article become associate circuit judges. Under Section 16 of Article V (which is not in the Schedule) each county shall have such number of associate judges as provided therein and by law. Therefore, although Section 2 of the Schedule abolishes magistrate courts, it also provides that when such courts cease to exist the jurisdiction of magistrate court shall be transferred to the circuit court of the circuit and such courts shall become divisions of the circuit court. We interpret Section 10.a.3 of the Schedule as recognizing that such magistrate judges will become associate circuit judges in divisions of the circuit court and as expressly providing that the clerks and the deputies of the respective divisions (the present magistrate clerks and deputies) shall continue to be selected in the same manner as provided for by law on the effective date of the amendments until otherwise changed by law.

At first glance it may appear that this argument would support a conclusion contrary to that reached in our Opinion No. 23-1977, cited above. However, Schedule Section 4.b provides that judges of the courts of common pleas shall become circuit judges and under Section 480.110, RSMo, the judge of the 32nd Judicial Circuit is designated judge of the Cape Girardeau Court of Common Pleas. Since Schedule Section 10.a.3 refers to "division of the circuit court presided over by an associate circuit judge" it is not applicable to the Cape Girardeau Court of Common Pleas. We conclude that the holding of our Opinion No. 23-1977 is correct.

In view of the fact that magistrates do not become associate circuit judges until January 2, 1979, and the clerks of the magistrate courts become clerks of divisions of circuit courts on January 2, 1979, the chief magistrate clerk provided for in Section 483.495 is to be elected at the November General Election, 1978. Such person will, on January 2, 1979, become chief clerk of the divisions of the circuit court presided over by associate circuit judges who were magistrate judges on January 1, 1979.

CONCLUSION

It is the opinion of this office that under the amendments to Article V of the Missouri Constitution, effective January 2,

1979, the chief clerk of the magistrate court of Greene County elected under Section 483.495, RSMo Supp. 1975, becomes the chief clerk of divisions of the circuit court presided over by the associate circuit judges who were judges of the magistrate court on January 1, 1979. Unless otherwise provided for by law, there will be elected a chief clerk of the Greene County magistrate court at the November General Election, 1978, and the county clerk of Greene County is required to accept declarations of candidacy for such office.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

OFFICE OF ADMINISTRATION;
CRIMINAL COSTS:
PRISONERS:
COUNTIES:

The per diem costs of incarceration of prisoners for which the state is responsible under the provisions of Chapter 550, RSMo, are to be determined by the Office of Administration pursuant to the provisions of Section 221.105, RSMo Supp. 1976.

OPINION NO. 177

August 10, 1977

FILED
177

Mr. Stephen Bradford, Commissioner
Office of Administration
Room 125, State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Bradford:

On August 31, 1976, we issued our Opinion No. 166 to J. Neil Nielsen, Commissioner of Administration, respecting reimbursement to counties for the cost of board of prisoners pursuant to Chapter 550, RSMo and House Bill No. 1130, Second Regular Session, 78th General Assembly. We expressed the view that the responsibility of the state under such sections was limited to only the cost of food service, cook hire and food preparation, food cooking and food service equipment and related utilities. We have reviewed that opinion in detail and we are now of the view that such opinion was in error. Therefore, Opinion No. 166-1976 is withdrawn.

Section 2 of House Bill No. 1130, Second Regular Session 78th General Assembly, (Section 221.105, RSMo Supp. 1976), provides:

> "1. The governing body of any county and of any city not within a county shall fix the amount to be expended for the cost of incarceration of prisoners confined in jails or medium security institutions. The per diem cost of incarceration of these prisoners chargeable by the law to the state, shall be determined, subject to the review and approval of the office of administration.
>
> "2. The actual costs chargeable to the state shall be seventy-five percent of the allowable per diem cost or eight dollars per day per person, whichever is less."

This law repealed Section 221.110, RSMo 1969, and Sections 66.500, 221.090 and 221.100, RSMo Supp. 1975. The law also repealed and reenacted with amendments Section 216.221, RSMo Supp. 1975, relating to half-way houses. This latter repeal and amendment is not perintent to the present question.

All the other sections which were repealed concerned the boarding of prisoners. That is, Section 221.090, RSMo Supp. 1975, related to the boarding of prisoners in second, third and fourth class counties and provided that when the state was liable under existing laws for the costs, the bill of costs was to include all fees which were properly chargeable to the state for the board of the prisoner. Section 221.100, RSMo Supp. 1975, related to first class counties and provided the county court would fix the amount to be expended by the sheriff for the board of prisoners and the amount so fixed was to be taxed as costs against convicted prisoners and that board chargeable by law to the state would be paid by the state. Section 221.110, RSMo 1969, applied to the City of St. Louis and provided that the municipal assembly would fix the amount to be expended per diem for the board of each prisoner confined in jail and the amount so fixed was to be taxed as costs against prisoners who were convicted and the board of the prisoners which was chargeable by law to the state would be paid by the state. That section also provided for a maximum of three dollars per day per person.

Section 66.500, RSMo Supp. 1975, related to St. Louis County and contained provisions substantially similar to those relating to St. Louis City as provided in Section 221.110.

In the First Regular Session of the 78th General Assembly, there was an attempt made in House Committee Substitute for House Bill No. 427 to amend Sections 66.500 and 221.110. The bill was truly agreed to and finally passed; however, it was vetoed by the Governor for the reasons stated in his veto message of July 28, 1975. We mention this bill, however, because it is interesting to note that Section 66.500 was proposed to be amended to substitute the terminology "cost of incarceration" for the word "board" in the first paragraph of that section and to substitute the amount of eight dollars per day maximum for three dollars per day in the second paragraph of such section. Section 221.110 would have been amended also to substitute "cost of incarceration" for the word "board," to add "or medium security institution" after the word "jail," and also to raise the maximum to eight dollars per day from three dollars.

Apparently House Bill No. 1130, Second Regular Session, 78th General Assembly, which is questioned here, was a response to the veto of House Bill No. 427. In its final form it appears to be

taken from the language of Sections 66.500 and 221.110 with certain obvious changes. That is, Section 2.1 of House Bill No. 1130 applies to the governing body of any county and any city not within a county. It obviously contains the words "cost of incarceration" instead of "board" and retains a maximum payable by the state in those cases where the charges are by law required to be paid by the state.

It is our view that the legislature in using the terminology "cost of incarceration of prisoners" intended that the term "incarceration" would be interpreted as being broader than the term "board". Although the provision states that the "per diem cost of incarceration of these prisoners chargeable by law to the state, shall be determined subject to the review and approval of the office of administration", we are of the view that the underscored terminology refers to prisoners and not to the "cost" and therefore the provisions of Chapter 550, RSMo, which prohibit the state from paying any costs which are incurred on behalf of a convicted defendant, except the costs of board, are not qualifications to or limitations on the provision in question relating to the "cost of incarceration of prisoners."

We conclude that the provisions of House Bill No. 1130, which is presently designated as Section 221.105, RSMo Supp. 1976, authorizes the state to pay for the costs of incarceration of prisoners so confined whose confinement is chargeable to the state, subject to the review and approval as provided, up to seventy-five percent of the allowable per diem cost or eight dollars per day per person, whichever is less.

Questions concerning items respecting the "costs of incarceration of prisoners" should be resolved by the Office of Administration pursuant to its authority to review and approve per diem costs of such prisoners under Section 221.105.

CONCLUSION

It is the opinion of this office that the per diem costs of incarceration of prisoners for which the state is responsible under the provisions of Chapter 550, RSMo, are to be determined by the Office of Administration pursuant to the provisions of Section 221.105, RSMo Supp. 1976.

Very truly yours,

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

August 10, 1977

OPINION LETTER NO. 178

Dr. Arthur L. Mallory
Commissioner, Department of
Elementary and Secondary Education
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Dr. Mallory:

We have reviewed the Missouri State Board of Education's "Fiscal Year 1978 State Plan for Vocational Rehabilitation Services under Title I of the Rehabilitation Act of 1973, as amended." Our review has taken into consideration the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701, et seq., and the regulations promulgated pursuant thereto, 45 C.F.R. §§ 1361, et seq. In addition, we have taken into consideration Article III, Section 38(a), Missouri Constitution; Chapter 161, RSMo 1969, as amended RSMo Supp. 1975; and Section 178.610, RSMo 1969.

Based on the foregoing, we hereby certify that the Missouri State Board of Education is the state agency administering or supervising the administration of education and vocational education in the state of Missouri and is, therefore, qualified to be "the sole State agency to administer the State plan, or to supervise its administration in a political subdivision of the State by a sole local agency . . ." in accordance with 45 C.F.R. § 1361.6

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

COUNTY BUDGET: Necessary funds required for the enforcing of House Bill No. 601, 79th General Assembly, during 1977 are automatically included within the 1977 budgets of counties of the third class.

OPINION NO. 179

September 28, 1977

FILED
179

Honorable Steve Lampo
Prosecuting Attorney of
Newton County
P. O. Box 511
Neosho, Missouri 64850

Dear Mr. Lampo:

This is in response to your opinion request as follows:

> "Can the County Court of Newton County, Missouri, a third class county, appropriate funds mid-year to implement the Child Support Enforcement provisions of House Bill No. 601."

In your request, you mention that House Bill No. 601 was enacted as emergency legislation requiring in Sections 2.2 and 2.9, thereof, that the county court appropriate funds for the purpose of implementing its provisions. Such bill was signed by the Governor on June 8, 1977, and became a law on July 1, 1977, under the provisions of Section A of such bill. It is your expressed feeling that Section 50.740, RSMo, as amended in 1965, implies that revisions in the budget can only be made at the county court's regular February term and, therefore, no expenditures as provided for in such bill can be made for the budget year of the county, that is, the calendar year 1977.

The case of Gill v. Buchanan County, 142 S.W.2d 665 (Mo. 1940), considered the question of whether the fact that the county court of Buchanan County had failed to provide in its budget for the full salaries of a county judge would preclude the recovery of such salaries by judges. It held at page 668 that:

> ". . . They must be considered to be in the budget every year because the Legislature has put them in and only the Legislature can take them out or take out any part of these amounts. . . ."

Honorable Steve Lampo

This case was considered in analyzing an opinion request in 1949 regarding whether the increase in salaries of prosecuting attorneys effective July 7, 1949, which was several months after the 1949 county budgets were made out, was automatically included in the county budget for 1949. In Opinion No. 95, 1949, to Joe C. Welborn, which is attached hereto, this office held that the increase for prosecuting attorneys was automatically included within the budget of counties of the third and fourth class even though the increase by law became effective several months after the 1949 county budgets were made out. It is our belief that the Gill case, supra, and Opinion No. 95 go to the heart of your inquiry. We conclude therefrom that the additional funds needed under House Bill No. 601, 79th General Assembly, are automatically included in the 1977 budget of the county court of Newton County, which is a third class county.

CONCLUSION

It is the opinion of this office that necessary funds required for the enforcing of House Bill No. 601, 79th General Assembly, during 1977 are automatically included within the 1977 budgets of counties of the third class.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Terry C. Allen.

Yours very truly,

John Ashcroft

JOHN ASHCROFT
Attorney General

Enclosure: Op. No. 95
7-18-49, Welborn

PROSECUTING ATTORNEYS: DIVISION OF FAMILY SERVICES: Pursuant to Section 2 of House Bill 601, First Regular Session, 79th General Assembly, the prosecuting attorney has authority and is required to litigate child support enforcement actions with respect to persons who are not recipients of public assistance but who have been referred by the Division of Family Services to him. The duty to litigate such actions includes the initiation of whatever action is necessary to enforce judgments including garnishment.

OPINION NO. 180

December 22, 1977

Mr. Ronald L. Boggs
Prosecuting Attorney
St. Charles County
200 North 2nd Street
St. Charles, Missouri 63301

Dear Mr. Boggs:

This opinion is in response to your question asking whether the prosecuting attorney must attempt to collect judgments for payment of child support for persons who are not recipients of public assistance, by garnishment or other proceedings, under House Bill 601, First Regular Session, 79th General Assembly.

We note that St. Charles County, the County Circuit Clerk and yourself have entered into a "Support Enforcement Cooperative Agreement" with the Division of Family Services of the Department of Social Services which is presently effective. However, we are of the view that it is not necessary to rely on the provisions of such contract to answer your question.

Subsection 4 of Section 2 of the act (which immediately follows the reenactment of Section 559.353) provides:

> "4. The director of the division shall render child support enforcement services to persons who are not recipients of public assistance as well as to such recipients. An application shall be filed with the division for services, and an application fee may be required by the division. An additional fee for expenses incurred in excess of the

> application fee may be required by the division in providing services; provided, however, that any additional fee shall not exceed ten percent of any support money recovered and provided that the amount of the fee shall be agreed to by the applicant in writing. Expenses incurred by a county under a cooperative agreement with the division in the prosecuting attorney's office or in the circuit clerk's office in enforcing or collecting a child support obligation in any civil litigation or other noncriminal proceeding for a person who is not a recipient of public assistance, but who has made an application with the division for child support enforcement services shall be construed as expenses incurred by the division. The application fee and any additional fee may be deducted from the support money recovered. Fees collected pursuant to this subsection shall be deposited in the child support enforcement fund in the state treasury."

Subsection 5 of Section 2 provides:

> "5. Each prosecuting attorney in this state, as an official duty of such office, shall litigate or prosecute any action necessary to secure support for any person referred to such office by the division of family services, including, but not limited to reciprocal actions under chapter 454, RSMo, actions to enforce obligations owed to the state under an assignment of support rights and actions to establish the paternity of a child for whom support is sought."

Thus, it is clear that the quoted statutory provisions indicate a legislative intent that such prosecuting attorneys shall litigate child support enforcement actions for persons who are not recipients of public assistance who have met the requirements of subsection 4 of Section 2 of the act and have been referred to such prosecuting attorneys by the Division of Family Services.

It is our view that the authority of the prosecuting attorney to litigate is not limited in the forms of civil proceedings to be followed and that such authority necessarily includes such action as is necessary for the enforcement of the judgments obtained including garnishment or other process afforded by law for the enforcement of judgments.

CONCLUSION

It is the opinion of this office that pursuant to Section 2 of House Bill 601, First Regular Session, 79th General Assembly, the prosecuting attorney has authority and is required to litigate child support enforcement actions with respect to persons who are not recipients of public assistance but who have been referred by the Division of Family Services to him. The duty to litigate such actions includes the initiation of whatever action is necessary to enforce judgments including garnishment.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

November 1, 1977

OPINION LETTER NO. 181

Honorable Henry A. Panethiere
State Senator, District 11
1104 Oak
Kansas City, Missouri 64106

Dear Senator Panethiere:

This is in response to your request asking:

> "Is the Kansas City Area Transportation Authority, an entity created for operation of public transit system in the states of Missouri and Kansas by means of a Compact executed by those states (Sec. 238.010, et seq., R.S.Mo. 1969 and Sec.12-2524, K.S.A.) under state law an agency or instrumentality of the state.
>
> "And, if so, effective date it became such."

You also state:

> "The Kansas City Area Transportation Authority receives federal funds from the urban mass transportation administration for project developments. These funds are placed in interest-bearing accounts prior to project disbursement. The Intergovernmental Cooperation Act of 1968 42 U.S.Code Ann. Sec.4213 provides that states or agencies and instrumentalities thereof are not held accountable for interest earned pending program disbursement. Political subdivisions of states are held accountable. The Department of Transportation has agreed to abide by the opinion of local state attorneys as to

> whether the KCATA is an agency or instrumentality of the state under state law."

As you have indicated, the laws relating to the Kansas City Area Transportation Authority are found at Sections 238.010, et seq., RSMo, and Sections 12-2524, et seq., K.S.A. The Compact was approved by Congress on September 21, 1966. 80 Stat. 826, P.L. 89-599.

Title 42 U.S.C.A. § 4213 provides in part:

> ". . . States shall not be held accountable for interest earned on grant-in-aid funds, pending their disbursement for program purposes."

We have been advised that a decision of the Comptroller General of the United States dated February 9, 1977, File E-180617, holds that the federal grantor agency should follow state law in determining whether transit authorities are state instrumentalities, and therefore permitted to retain any interest earned on federal grants, or political subdivisions of the state, which may not retain such interest. Such decision cites Section 203 of the Intergovernmental Cooperation Act of 1968 which is quoted above from U.S.C.A.

Article III of the Compact states in part:

> "There is created the Kansas City Area Transportation Authority of the Kansas City Area Transportation District (hereinafter referred to as the 'Authority'), which shall be a body corporate and politic and a political subdivision of the States of Missouri and Kansas."

Further, we note that the Kansas City Area Transportation Authority was assigned to the Missouri Department of Transportation under Section 14.2 of the Omnibus State Reorganization Act of 1974, RSMo Supp. 1975, Appendix B, p. 1274, and is an assigned agency of that department under the Department of Transportation Plan of Reorganization, RSMo Supp. 1975, Appendix C, p. 1331. Additionally, under such Plan the Authority works closely with the Division of Transit.

Clause 3, Section 10 of Article I of the United States Constitution provides:

> "No state shall, without the consent of Congress, lay any duty of tonnage, keep troops

> or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

In Kansas City Area Transportation Authority v. Ashley, 478 S.W. 2d 323 (Mo. 1972), the Supreme Court of Missouri held that the Authority is not a political subdivision within the now repealed Missouri constitutional provision giving the Missouri Supreme Court original jurisdiction in cases involving political subdivisions of the state despite the provisions in the law creating the Authority which states that the Authority is a "political subdivision." The court stated that such Authority did not have a delegation of governmental functions as would constitute that agency a governmental unit requiring Missouri Supreme Court jurisdiction such as levying, collecting taxes, electing officers, and defining powers and duties as governmental offices of the body corporate.

Further, the United States Eighth Circuit Court of Appeals held in Ladue Local Lines, Inc. v. Bi-State Development Agency of the Missouri-Illinois Metropolitan District, 433 F.2d 131 (8th Cir. 1970), that such a compact body is a joint or common agency of the two compact states.

It was similarly held by the United States Supreme Court that state agencies created by a compact between states are common or joint agencies of such states. Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275, 3 L.Ed.2d 804, 79 S.Ct. 785 (1959). It has also been held that the Board of Transportation of New York, though its members are appointed by the mayor and it acts as the city's agent in operating the rapid transit system, is nevertheless a "state instrumentality" in transit matters and performs a state function. Klein v. O'Dwyer, 80 N.Y.S.2d 343 (N.Y. 1948). Although it was held that employees of the Board of Transportation of New York City were not state employees but were city employees, the Board was held to be a state instrumentality. Ferdinand v. Moses, 26 N.Y.S.2d 382 (N.Y. 1941). Where a statute created a bridge authority to acquire an international bridge which it bought with the cooperation of the Canadian government, the Authority was held to be a state agency. People ex rel. Buffalo and Fort Erie Public Bridge Authority v. Davis, 14 N.E.2d 74 (N.Y.App. 1938).

It has also been held that the Board of Commissioners of the Port of New Orleans is a "state agency." Hartwig Moss Ins. Agency, Limited v. Board of Com'rs of Port of New Orleans, 19 So.2d 178 (La. 1944). Likewise, housing authorities have been held to be state agencies for certain purposes. People ex rel. Stokes v. Newton, 101

P.2d 21 (Colo. 1940). In New Jersey, it has been held that the Turnpike Authority was a state agency for bond act purposes. Morris County Industrial Park v. Thomas Nicol Co., 173 A.2d 414 (N.J. 1961). And in New Jersey, it was held that the Port of New York Authority, a bi-state corporation created by a compact between the states of New York and New Jersey, is a direct state agency and an alter ego of the state. Miller v. Port of New York Authority, 15 A.2d 262 (N.J. 1939).

It was also held in New Jersey that a New Jersey member of the Waterfront Commission of New York Harbor, a bi-state agency created by a compact between the legislatures of New York and New Jersey and approved by an act of Congress, was not a "state officer" and the Commission was not a state agency as to which the New Jersey conflicts of interest law was applicable. De Rose v. Byrne, 343 A.2d 136 (Super.Ct.N.J. 1975) vacated for mootness 353 A.2d 100 (Super.Ct.N.J. 1976).

The court stated, however, at l.c. 142:

> "As the product of an interstate compact, the Waterfront Commission is not a single state agency created and exclusively controlled by one state. It is an instrumentality of the States of New York and New Jersey, and beyond being an agent of each state it is an agent of both of them (citations omitted) . . ."

This office has held that the Kansas City Area Transportation Authority is not a state agency within Section 29.200, RSMo 1969, relating to the post-audit of accounts of state agencies by the State Auditor. Opinion No. 142 dated July 24, 1975, to Lehr. This office also held in Opinion No. 20A dated April 24, 1970, to Kirkpatrick that the State Records Act, as found in Sections 109.200, et seq., RSMo, does not apply to the Kansas City Area Transportation Authority.

It is clear from the body of law we have reviewed that the terms "state agency" or "state instrumentality" are often given a restrictive meaning where the application of particular state laws are concerned, but nevertheless are defined broadly where it is intended to characterize the nature of a body created to perform governmental functions, either directly or in conjunction with another sovereign.

In light of the cases we have reviewed, it is our conclusion that although the Kansas City Area Transportation Authority is by statute denominated a "political subdivision," such denomination is not determinative as to the Authority's legal status. Clearly,

the authority is an agency and an instrumentality of the states of Missouri and Kansas created by compact between such states with congressional approval.

Your second question asks as to the effective date of the creation of the Kansas City Area Transportation Authority. However, the real import of your question is whether or not the effective date was prior to the date of October 16, 1968, after which such entities are entitled to retain interest earned on federal grants. Inasmuch as the Compact was executed in December, 1965, and received congressional approval in September, 1966, it is clear that no matter which date is taken to be the effective date of the creation of the Authority, interest would be due from the date of October 16, 1968, the effective date of Section 203 of the Intergovernmental Cooperation Act of 1968 because the Kansas City Area Transportation Authority was obviously in existence prior to October 16, 1968.

Very truly yours,

JOHN ASHCROFT
Attorney General

August 17, 1977

OPINION LETTER NO. 182
Answer by letter-Klaffenbach

FILED
182

Honorable Norman L. Merrell
President Pro Tem of the Senate
Room 423, State Capitol Building
Jefferson City, Missouri 65101

Dear Senator Merrell:

This letter is in response to your questions asking as follows:

> "1. Section 51 of Article IV of the Missouri Constitution provides for a period of thirty days for the Senate to act upon appointments made by the governor. Are such days to be measured as calendar days or legislative days?
>
> "2. If the Senate is not in session (at a special session of the general assembly) for at least thirty calendar or legislative days, may an appointee, whose appointment requires the advice and consent of the Senate and which was not considered by the Senate, continue to hold the office?
>
> "3. May the appointment be further considered at the next regular session of the general assembly, and if so, in what period of time?
>
> "4. If the appointment is not considered, is this a rejection which would preclude the

appointee from ever being reappointed to the same office or position?"

You also state:

"The Missouri general assembly is now meeting in special session. The governor has made some appointments in the period between the end of the last regular session of the general assembly and the convening of this special session which will require the advice and consent of the Senate. Apparently he must submit all such appointments to the Senate. See AG Opinion # 24, given on November 10, 1942.

"The Senate may adjourn before thirty calendar or legislative days have run since the special session convened."

You have asked for an immediate response to your questions; and, therefore, we have attempted to condense our views in order to meet the time limitations imposed upon us.

Section 51 of Article IV of the Missouri Constitution provides:

"The appointment of all members of administrative boards and commissions and of all department and division heads, as provided by law, shall be made by the governor. All members of administrative boards and commissions, all department and division heads and all other officials appointed by the governor shall be made only by and with the advice and consent of the senate. The authority to act of any person whose appointment requires the advice and consent of the senate shall commence, if the senate is in session, upon receiving the advice and consent of the senate. If the senate is not in session, the authority to act shall commence immediately upon appointment by the governor but shall terminate if the advice and consent of the senate is not given within thirty days after the senate has convened in regular or special session. If the senate fails to give its advice and consent to any appointee, that person shall not be reappointed by the governor to the same office or position."

We have not been able to find a comparable provision elsewhere or case authority directly in point; and, therefore, our study of the question is generally limited to what we believe to be the intent of the voters in adopting such amendment.

The Supreme Court of Missouri in the case of State ex inf. Danforth v. Cason, 507 S.W.2d 405, 409 (Mo. Banc 1973), said:

> "The same standard of interpretation was expressed in Household Finance Corporation v. Schaffner, 356 Mo. 808, 203 S.W.2d 734, 737 (banc 1947), as follows:
>
> '* * * The only way we can determine what meaning was conveyed to the voters by the provision is to determine what it means to us, giving the words used their ordinary and usual meaning. * * *'
>
> "Subsequent cases announcing a similar rule include Rathjen v. Reorganized School District R-II of Shelby Co., 365 Mo. 518, 284 S.W. 2d 516 (banc 1955), and State ex rel. Curators of the University of Missouri v. Neill, 397 S.W.2d 666 (Mo. banc 1966)."

Section 51 expressly provides that the authority to act of an official first appointed during a legislative recess shall commence immediately upon the appointment by the Governor but shall terminate if the advice and consent of the Senate is not given within thirty days after the Senate has convened in regular or special session. Clearly, the Constitution contemplates that the advice and consent of the Senate must be given in special session or in regular session, whichever first occurs after the appointment.

We take note of the fact that it is not at all unusual for a special session to last for less than thirty calendar days. It is also obvious that generally special sessions would not last thirty legislative days.

Further, the duration of special sessions under Section 20a of Article III of the Missouri Constitution is calculated on a calendar day basis. Such section provides that the legislature stands automatically adjourned on the sixtieth calendar day after the date of convening of a special session unless the legislature has adjourned prior thereto.

We therefore believe that the requirement that the advice and consent of the Senate be given within thirty days after the Senate has convened in regular or special session necessarily means thirty calendar days and not legislative days. Furthermore, we believe that if the Senate adjourns and does not confirm the appointment prior to the expiration of thirty calendar days, the authority of the appointee to act terminates thirty calendar days after the date the Senate convened. It is understood that you are referring to this present special session which convened August 10, 1977. We assume that the session will not be followed by another special session within thirty days of August 10, 1977.

It is also clear that the Constitution expressly provides that if the Senate fails to give its advice and consent to such appointee, that person shall not be reappointed by the Governor to the same office.

Yours very truly,

JOHN ASHCROFT
Attorney General

October 6, 1977

OPINION LETTER NO. 183
Answer by Letter - Covington

FILED
183

The Honorable Russell G. Brockfeld
Room 204
Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Brockfeld:

This opinion is in response to your questions asking:

"1. Does any County Court or county governing body have the statutory right to license or regulate a Solid Waste Disposal Area?

"2. Does any County Court or any county governing body have the statutory authority to license any person operating a dump for 'special' or 'hazardous' wastes?"

Your first question relates to the Solid Waste Management Law, Sections 260.200 to 260.245, RSMo Supp. 1975. To implement a statewide solid waste management system the Legislature has provided in Section 260.215.1 that:

> "each county . . . shall provide . . . for the collection and disposal of solid wastes within its boundaries; shall be responsible for implementing their approved plan required by section 260.220 as it relates to the storage, collection, transportation, processing, and disposal of their solid wastes; and may purchase all necessary equipment, acquire all necessary land, build any necessary buildings, incinerators, transfer

> stations, or other structures, lease or otherwise acquire the right to use land or equipment. Each city and county, may . . . do all other things necessary to provide for a proper and effective solid waste management system; . . ." [Emphasis added.]

Section 260.215.2 further provides that:

> "Any city or county may adopt ordinances, rules, regulations, or standards for the storage, collection, transportation, processing or disposal of solid wastes which shall be in conformity with the rules and regulations adopted by the department for solid waste management systems. However, nothing in sections 260.200 to 260.245 shall usurp the legal right of a city or county from adopting and enforcing local ordinances, rules, regulations, or standards for the storage, collection, transportation, processing, or disposal of solid wastes equal to or more stringent than the rules or regulations adopted by the department pursuant to sections 260.200 to 260.245."

The broad language in the above sections authorizes the county to do all things necessary to provide for an effective solid waste management system. Therefore, in response to your first question, it is our opinion that there is necessarily implied, incident to such power and authority, authority to regulate a solid waste disposal area and to require that a license or permit be obtained by one who desires to engage in the business of collecting, transporting, or disposing of solid wastes. We so held in Opinion Letter No. 12, Boggs, rendered February 3, 1976, a copy of which is attached.

Your second question, which refers to "special" and "hazardous" wastes, relates at present to the Solid Waste Management Law. We must also take note, however, of the Hazardous Waste Management Law, House Bill No. 318, 79th General Assembly, First Regular Session, effective September 28, 1977.

The Solid Waste Management Law contemplates coverage of "special wastes," meaning "solid wastes requiring handling other than that normally used for municipal wastes" (10 CSR 80-2.010(29)) and "hazardous wastes," meaning "waste materials that are: toxic or poisonous; corrosive; irritating or sensitizing; radioactive;

biologically infectious; explosive; or flammable and that present a significant hazard to human health and the environment" (10 CSR 80-2.010(12)). "Special" and "hazardous" wastes are necessarily included in "Solid Waste", and thus subject to regulation under Sections 260.200 - 260.245. We believe that the reasoning set out in the response to question No. 1 applies to your second question as well. We believe that there is necessarily implied from the broad language of Section 260.215 authority to require that a license be obtained by a person who wishes to operate a dump for "special" or "hazardous" wastes except as hereinafter pointed out.

The Missouri Hazardous Waste Management Law, House Bill 318, 79th General Assembly, First Regular Session, effective September 28, 1977, applies to hazardous waste facilities. Assuming that the "hazardous" waste to which your question refers falls within the types of hazardous wastes sought to be managed in House Bill 318, then the regulation of such wastes is subject to House Bill 318.

Section 17.2 provides that:

> "No action, ordinance or law, with the exception of local option on location, of any county, city, town, village or other political subdivision of this state shall operate to prevent the location or operation of a hazardous waste facility or transporter holding a current hazardous waste facility permit or transporter license issued hereunder within its boundaries."

Section 17.2 of House Bill 318 constitutes a clear legislative statement that local governments cannot regulate the licensing or operation of any facility which falls under the jurisdiction of the Act and for which a permit under the Act has been issued. Whether a county would still retain the authority to regulate that facility under Section 260.215 depends on whether the legislature intended House Bill 318 to supercede the Solid Waste Management Law insofar as a particular facility could be regulated under either law.

Where a statute covers an entire subject matter of prior statutes and manifests a legislative intent that the later act prescribe the law with respect to the entire subject matter, the later act supercedes the earlier laws. Pogue v. Swink, 261 S.W.2d 40 (Mo. 1953). Section 9 and subsections 10.7 through 10.15 of House Bill 318 establish a comprehensive program for the permitting

and regulation of hazardous waste facilities. (Disposal sites are included within the term hazardous waste facility, H.B. 318, Section 3(9).) The scope of regulation and the limitations on construction and operation of a hazardous waste facility are considerably more detailed than the provisions in Sections 260.205 and 260.210, relating to state permitting and regulation of solid waste disposal areas. For example, requirements for reporting information from hazardous waste facility owners or operators to the Department of Natural Resources are significantly more detailed and rigorous than those applicable to solid waste disposal areas. House Bill 318, Section 9(3)(4)(5) and (6). Demonstration of financial responsibility including, but not limited to, guaranties, liability insurance, posting of bond, or any combination thereof, must be included in an application for a permit to operate a hazardous waste facility. Section 10.7(3). Thus, in the case of a disposal site which is both a solid waste disposal area and a hazardous waste facility, it appears that a permit issued under the earlier statute would be superfluous. We cannot believe that the legislature in such circumstances intended that a disposal site operator apply for permits under both statutes. We believe, therefore, that the legislature intended that House Bill 318 supercede Section 260.200 to 260.245, RSMo Supp. 1975, where both statutes would by their terms apply to a particular operation.

Where, as to a particular landfill (disposal site), regulation under the Solid Waste Management Law has been superceded by House Bill 318, it necessarily follows that the county's authority under the former statute is likewise superceded. Therefore, once a landfill operator acquires a hazardous waste facility permit under House Bill 318, we are of the opinion that a county court cannot license or otherwise regulate that landfill.

It is our view that a county court or county governing body may regulate a solid waste disposal area which is subject to the provisions of the Solid Waste Management Law, Sections 260.200 to 260.245, and that a county may likewise regulate under the Solid Waste Management Law a landfill which is being used to dispose of special or hazardous wastes, unless and until the landfill becomes subject to regulation under House Bill 318, 79th General Assembly, First Regular Session. If, however, the landfill holds a permit under House Bill 318, the county governing body will be precluded from regulating the operation of such landfill.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosure: Op. Ltr. No. 12
2/3/76, Boggs

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

August 22, 1977

OPINION NO. 186

Arthur L. Mallory, Commissioner
Department of Elementary and
Secondary Education
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Dr. Mallory:

In accordance with your request of August 16, 1977, we have reviewed the Missouri Department of Elementary and Secondary Education's "State Application for Federal Assistance under Title II of the Indochina Refugee Children's Act of 1976." This application is being submitted pursuant to Title II of Public Law 94-405 (appearing at 20 U.S.C. 1211b).

In addition to Title II of Public Law 94-405 and the regulations propounded pursuant thereto (45 CFR Part 122a, June 3, 1977), our review has taken into consideration Article III, Section 38(a), Missouri Constitution, and Section 161.092, RSMo Supp. 1975.

Based on the foregoing, we hereby certify that the Missouri Department of Elementary and Secondary Education has authority under state law to perform the duties of a "state educational agency" as defined in Section 201(b)(7) of Title II, P. L. 94-405.

This opinion letter constitutes our official certification and should be inserted in the appropriate place in each copy of the application.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

SCHOOLS:
SCHOOL DISTRICTS:
SCHOOL TRANSPORTATION:

The distances set forth in Section 167.231, RSMo Supp. 1975, are to be measured from the door of the pupil's home to the door of the school along the most direct traveled route. An urban school district governed by Section 167.231 has no authority to transport pupils at district expense living less than one mile but more than one-half mile from school absent a favorable election for that purpose in accordance with that section. An urban school district governed by Section 167.231 has no authority to transport pupils at district expense who live less than one-half mile from school.

OPINION NO. 188

September 30, 1977

FILED
188

Honorable Paul L. Bradshaw
Senator, District 30
705 Woodruff Building
Springfield, Missouri 65805

Dear Senator Bradshaw:

This opinion is issued in response to your request for an official ruling of this office concerning the transportation of pupils in an urban school district at the district's expense. Specifically, your questions are as follows:

> "1. Does the school board of Springfield R-12 School District, an Urban School District, have the power and authority to establish and implement a 'barrier street' policy under which the school district would furnish free transportation to pupils in kindergarten through eighth grade who are required to cross certain streets considered to be unusually hazardous, designated as 'barrier streets,' in going to and from their assigned schools and their homes, when such pupils live less than one mile and more than one-half mile from school measured along (i) the closest traveled way or (ii) the main traveled way, and there has not been a favorable vote of the electorate at an election held in accordance with the provisions of Section 167.231, RSMo?

"2. If the answer to question No. 1 above is in the affirmative, would the answer thereto be different if under the barrier street policy the cases of individual pupils, whose homes are situated as provided in question No. 1, are considered by a committee and are then reviewed by the school board before transportation is furnished or denied on an individual case basis, the decision depending upon the nature and extent of the hazards involved in a given case and taking into account the age of the pupil and the actual distance he must travel to avoid crossing the unusually hazardous 'barrier street?'

"3. Does the school board of Springfield R-12 School District, an Urban School District, have the power and authority to establish and implement a 'barrier street' policy under which the school district would furnish free transportation to pupils in kindergarten through eighth grade who are required to cross certain streets considered to be unusually hazardous, designated as 'barrier streets,' in going to and from their assigned schools and their homes, when such pupils live one-half mile or less from school, measured along (i) the closest traveled way or (ii) the main traveled way, even if there should be a favorable vote of the electorate at an election held in accordance with the provisions of Section 167.231, RSMo?

"4. If the answer to question No. 3 above is in the affirmative, would the answer thereto be different if under the barrier street policy the cases of individual pupils, whose homes are situated as provided in question No. 3, are considered by a committee and are then reviewed by the school board before transportation is furnished or denied on an individual case basis, the decision depending upon the nature and extent of the hazards involved in a given case and taking into account the age of the pupil and actual distance he must travel to avoid crossing the unusually hazardous 'barrier street?'

"5. In applying the provisions of Section 167.231, for the purpose of determining the eligibility of a public school pupil for free transportation, how should the distances referred to in said section be measured--

A. From the door of the home of the pupil that is nearest the school house along a private lane or roadway, if any, to the main traveled highway, thence along such main traveled highway to the front door of the school house? (See Op. Atty. Gen. Mo. 79, Rough, 11/27/33)

B. From the door of the home of the pupil nearest the school house to the front door of the school house which the pupil attends along a route which is reasonably suitable for pedestrian travel? (See Op. Atty. Gen. Mo. 21, Wheeler, 3/18/69; Op. Atty. Gen. Mo. 400, Frappier, 11/11/69)

C. If the distance is to be measured 'along a route which is reasonably suitable for pedestrian travel,' what criteria and standards are to be used and how are they to be applied in making such measurement, when the eligibility of a public school pupil to free school transportation is determined under the provisions of Section 167.231?

D. In computing state aid under the recently enacted State Aid for Transportation of Pupils law, would the answers to questions A, B, and C above be likewise applicable when measuring the distances from a pupil's home to the school to which he is assigned?"

Section 167.231, RSMo Supp. 1975, provides as follows:

"Within all school districts except metropolitan districts the board of education shall provide transportation to and from school for all pupils living more

> than three and one-half miles from school and may provide transportation for all pupils living one mile or more from school. When the board of education deems it advisable, or when requested by a petition signed by ten taxpayers in the district, to provide transportation to and from school at the expense of the district for pupils living more than one-half mile from school, the board shall submit the question at an annual or biennial meeting or election or a special meeting or election called for the purpose. Notice of the election shall be given as provided in section 162.061, RSMo. If two-thirds of the voters voting at the election are in favor of providing the transportation, the board shall arrange and provide therefor."

Because the answers to your first four questions are somewhat dependent on the manner in which the applicable distances are to be measured, we will first consider question 5 as it relates to the measurement of distances in connection with a pupil's eligibility for transportation at the school district's expense.

The general rule is expressed in 79 C.J.S., Schools and School Districts, Section 475(3):

> "In the absence of statute a school district owes no duty to transport pupils to and from schools, and any duty it may have is purely statutory and is limited by the terms of the statute.
>
> "Under some statutes the duty to transport pupils living more than a stated distance from school is mandatory. While such statutes should be liberally construed to effectuate the legislative intent, they should be reasonably construed so that, without unnecessary burden to the district, all children entitled thereto may be furnished transportation as nearly complete as is reasonably possible. Under such statutes no discretion is conferred on the school board to expand the statutory delegation of power. . . ." (Emphasis added).

There are no Missouri cases interpreting Section 167.231 with respect to the manner in which the distances are to be measured, so we must look to the terms of the statute to ascertain the intent of the legislature by giving the language thereof its plain and ordinary meaning. State ex rel. Dravo Corporation v. Spradling, 515 S.W.2d 512 (Mo. 1974).

In seeking to ascertain the legislature's intent and purpose, a court is to be guided by what the legislature has said, and not what the court may think it meant to say. United Air Lines, Inc. v. State Tax Commission, 377 S.W.2d 444 (Mo. Banc 1964). The question that must be asked, therefore, is whether the words of the statute indicate an intention on the part of the legislature to measure the distances from home to school along a direct route or along a route reasonably safe for pedestrian traffic. The words "mile" or "one-half mile" ordinarily comport no more than an objective distance, and in the absence of any other indicia of legislative intent, these words should be given their plain and ordinary meaning.

An aspect of the legislative history of Section 167.231 is significant. Prior to 1965, that section did not contain a provision for an election, the favorable result of which would empower school districts to transport pupils living one-half mile or more from school. That provision was added in 1965 and was accompanied by the following emergency clause, Laws 1965, p. 288:

> "Whereas in populous school districts where traffic is heavy, it is extremely hazardous for children to walk to and from school, and the longer the distance walked the more hazards incurred; and whereas on and after the first day of July, 1965, school districts, by law, may not transport children living less than one mile from school, this act is necessary for the immediate preservation of the public peace, health and safety and an emergency exists within the meaning of the constitution. This act, therefore, shall be in full force and effect when signed by the governor or on and after July 1, 1965, whichever occurs last." (Emphasis supplied)

It is clear that the General Assembly was cognizant of traffic hazards when it amended Section 167.231 in 1965, and recognized the lack of authority under the statute for school districts to transport children living less than one mile from school. Yet the legislature's solution to the problem was an immediate enactment of the election option to provide transportation to those who

lived between one-half mile and one mile from the school where the school board and the community deemed it advisable for safety reasons. If the legislature had intended that safety be taken into consideration in measuring the distances already set forth in the statute, the 1965 amendment would not have been necessary, and we cannot presume that the legislature intended a needless act. Wright v. J. A. Tobin Construction Company, 365 S.W.2d 742 (K.C.Mo.App. 1963). Under these circumstances, it appears that the legislature intended that the distances mentioned in the statute were to be measured in an objective manner, allowing individual school districts to deal with safety problems of children residing over one-half mile from the school by means of an election for additional transportation. It appears that the legislative intent was that, in school districts coming within the provisions of Section 167.231, pupils living within one-half mile of the school could not be transported no matter what hazardous conditions exist.

Still other evidence of the legislative intent is found by referring to other situations in which the legislature has conferred authority to provide pupil transportation. While Section 167.231 applies to six-director and urban school districts, the board of directors of a metropolitan school district is authorized in Section 162.621, RSMo 1969, to:

> "(8) Provide for the gratuitous transportation of pupils to and from schools in cases where by reason of special circumstances pupils are required to attend schools at unusual distances from their residencies."

The legislature's decision to confer this broad authority on metropolitan school districts further indicates that such discretion was not to be exercised by other types of districts.

In Opinion No. 79, 1933, this office interpreted Section 9354, Laws 1933, p. 388, a prior transportation statute. That statute required a school board under certain circumstances to maintain an elementary school:

> ". . . within three and one-half miles by the nearest traveled road of the home of every child of school age within said school district: . . . Provided however, no transportation shall be furnished if there be any school within three and one-half miles of such pupil . . . ."

The question presented in Opinion No. 79 was whether the mileage was to be measured from the pupil's front gate or from the door of his home. Relying on cases from other jurisdictions, the opinion ruled that measurement "as the crow flies" was inappropriate. Looking to the language of the statute and the probable legislative intent, the opinion also ruled that the distance should be measured "door to door" along the "nearest traveled road" or roads as provided in the statute.

Later revisions of the statute did not include the terms "by the nearest traveled road," but in Opinion No. 21, 1969, this office ruled that the "door to door" standard along a traveled route as set forth in Opinion No. 79 was applicable to the present statute.

Opinion No. 21, however, further stated that the route used to measure the applicable distance should be a route reasonably safe for pedestrian traffic.

While this result seems desirable in terms of the welfare and safety of the pupils, Opinion No. 21 did not set forth any legal authority for its conclusion. Our research has not revealed any case where safety was taken into consideration in construing a statute phrased only in terms of mileage. In fact, in at least one case, the opposite result has been reached.

A New York statute required school districts to furnish transportation for children residing more than two miles from the school. In the case of Studley v. Allen, 24 App. Div. 678, 261 N.Y.S.2d 138 (1965), the court held that "the legislative yardstick is distance, which is, objectively, readily ascertainable, and not hazard which involves a myriad of factors."

We have demonstrated above those rules of statutory construction and indicia of legislative intent which compel the conclusion that the distances from home to school are to be measured along the most direct traveled route from the door of the pupil's home to the door of the school. Opinion No. 21, insofar as it suggests otherwise, is no longer to be followed. While this result may appear harsh, we note that a remedy is within the power of the district itself, as to transportation for all children living over one-half mile from school, who shall be furnished transportation upon two-thirds vote of the taxpayers in the district. However, there is no authorization for transportation of pupils living within one-half mile of the school. If this solution is not adequate, then it is within the province of the legislature to amend the controlling statute.

In light of this conclusion, it is unnecessary to respond to your question 5C. In question 5D, you inquire as to the effect of the manner of measurement in Section 167.231 on the computation of said aid found in Section 163.161 (H.B. 131, 79th General Assembly). Prior to this recent enactment, a specified dollar amount of state aid for transportation was distributed on the basis of the number of pupils transported per mile. See Section 163.161, RSMo Supp. 1975. The new enactment, however, eliminated the "pupil per mile" calculation, and provides as follows:

> "1. Any school district which makes provision for transporting pupils as provided in sections 167.231 and 167.241, RSMo, shall receive state aid for the ensuing year for such transportation on the basis of the cost of pupil transportation services provided the current year. A district shall receive an amount not greater than eighty percent of the allowable costs of providing pupil transportation services to and from school, except that in no case shall a district receive an amount per pupil greater than one hundred twenty-five percent of the state average approved cost per pupil transported the second preceding school year. The state board of education shall approve all bus routes and determine the total miles each district should have for effective and economical transportation of the pupils and shall determine allowable costs."

This new section distributes state aid on the basis of the actual cost of transportation, and permits the State Board of Education to supervise local districts by approving bus routes, determining what costs will be allowable and by determining the total miles each district should have for effective and economical transportation of the pupils. Except for the determination of allowable costs, these supervisory functions also appeared in the prior formula. These supervisory functions were vested in the State Board to insure that local districts do not unnecessarily inflate the costs of pupil transportation, and it does not appear that this section would have any effect on the manner in which distances are measured pursuant to Section 167.231. Since the determination of "total miles each district should have for effective and economical transportation of the pupils" bears on the computation of state aid only insofar as it serves to prevent overlapping routes or other inefficient use of transportation services, the State Board may measure those miles in any reasonable way to effectuate that purpose.

Returning now to your questions numbered 1 through 4, the first situation outlined contemplates the furnishing of transportation to pupils in kindergarten through eighth grade living less than one mile and more than one half-mile from school where there has not been a favorable vote at an election held in accordance with Section 167.231. We have already concluded that those distances are to be measured by the most direct traveled route from the pupil's home to the school. While the district's concern for the safety and welfare of these youngsters is commendable, its powers are circumscribed by the terms of the applicable statute. As stated in Cape Girardeau School Dist. No. 63 v. Frye, 225 S.W.2d 484, 488 (St.L.Mo.App. 1949),

> ". . . A board of directors (of a school district) is but a creature of statute, and its members can exercise no authority unless the same is either expressly conferred or else arises by necessary implication from the powers that are conferred. . . ."

In this instance, Section 167.231 is clear in setting forth the authority of a school board to furnish transportation at taxpayer's expense. The district must provide transportation to those living more than three and one-half miles from school, and it may provide transportation for those living one mile or more away in its discretion. However, absent a favorable election as provided in the staututе, a school district has no authority to transport pupils living less than one mile but more than one-half mile from school. This conclusion was stated by the legislature itself in the emergency clause quoted above, Laws 1965, p. 288, when it enacted the election procedure. You indicated that the district here involved conducted such an election but that the proposition did not receive enough favorable votes to carry. As stated in 79 C.J.S., Schools & School Districts, Section 475, p. 405:

> "In the absence of statute a school district owes no duty to transport pupils to and from schools, and any duty it may have is purely statutory and is limited by the terms of the statute." (Emphasis added).

A general principal of statutory construction is that where special methods are prescribed for the exercise of a power, other powers or procedures are excluded. Brown v. Morris, 290 S.W.2d 160 (Mo. Banc 1956). Therefore, in the absence of a favorable election in accordance with the procedure set forth in Section 167.231, a school district has no power to implement

a "barrier street policy" where pupils who live less than one mile and more than one-half mile from school are furnished transportation.

A similar result is mandated with respect to children living less than one-half mile as described in your question number 3. Section 167.231 does not confer authority to transport such pupils under any circumstances, and as stated above, a school district may exercise only those powers which are expressly conferred. Cape Girardeau School Dist. v. Frye, supra. As we noted earlier in this opinion, the legislature has conferred broad authority to the directors of a metropolitan district to transport pupils who "by reason of special circumstances" are required to attend school "at unusual distances from their residences." Section 162.621, RSMo 1969. The absence of such a broad discretion as applied to the school districts governed by Section 167.231 indicates even more strongly that such districts are limited in the exercise of their powers to furnish transportation only in accordance with the terms of the statute. We therefore conclude that the district is not authorized to transport pupils living less than one-half mile from school pursuant to a "barrier street policy" as described in question 3.

Our negative rulings on questions 1 and 3 make it unnecesssary to rule on the matters contained in questions 2 and 4.

Conclusion

It is the opinion of this office that:

a) the distances set forth in Section 167.231, RSMo Supp. 1975, are to be measured from the door of the pupil's home to the door of the school along the most direct traveled route;

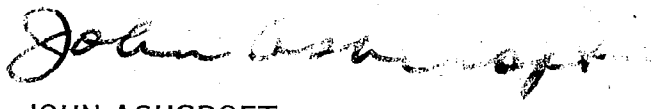
b) an urban school district governed by Section 167.231 has no authority to transport pupils at district expense living less than one mile but more than one-half mile from school absent a favorable election for that purpose in accordance with that section;

c) an urban school district governed by Section 167.231 has no authority to transport pupils at district expense who live less than one-half mile from school.

Honorable Paul L. Bradshaw

The foregoing opinion, which I hereby approve, was prepared by my assistant, Sheila K. Hyatt.

Yours very truly,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

October 24, 1977

OPINION LETTER NO. 189

Mrs. Carolyn Ashford, Director
Department of Natural Resources
1014 Madison Street
Jefferson City, Missouri 65101

Dear Mrs. Ashford:

This is in response to your recent opinion request, wherein you asked:

> "Pursuant to Section 260.215, RSMo Supp. 1975, does a city or county have the authority to require, by ordinance or county court order, that all solid waste, or certain categories thereof, generated within the jurisdiction of the city or county be disposed of at approved resource recovery (recycling) facilities, rather than being buried at landfills?"

The starting point of the inquiry is the statute itself. Section 260.215.1, relating to the regulation of solid waste, states in relevant part:

> "Except as otherwise provided in subsection 4, each city and each county . . . shall provide . . . for the collection and disposal of solid wastes within its boundaries; . . ."

Section 260.215.2 provides that:

> "Any city or county may adopt ordinances, rules, regulations or standards for the storage, collection, transportation, processing or disposal of solid wastes . . . ."

Section 260.215.4 essentially provides that the powers conferred upon cities and counties by Section 260.215 shall not be available to any unincorporated area in a second, third or fourth class county, or in a first class county having a population of more than one hundred fifty thousand and not having a charter form of government, nor to incorporated cities having a population of five hundred or less in such counties. However, the governing body of an exempted city, village or county may elect, after notice and public hearing, to avail itself of the powers conferred by Section 260.215. Thus, it appears that the powers conferred upon local governments by the statute are available to all cities and counties.

The regulation of the collection of garbage and refuse is a governmental function falling within the police powers of the state or municipality. 7 McQuillin, Municipal Corporations, §24.242, p. 81 (3d Rev. Ed. 1968); Craig v. City of Macon, 543 S.W.2d 772 (Mo. Banc 1976). The legislature, by Section 260.215, has given cities and counties wide latitude in dealing with the health hazards, nuisances and environmental pollution "that necessarily accompany the accumulation and unmanaged disposal of garbage, refuse and filth." Craig v. City of Macon, supra, at 777. It is clear that cities and counties in Missouri, as a function of the police powers delegated to them, can control not only the collection of solid wastes, but also the processing and disposal thereof. Section 260.215.2; see also, McQuillin, supra, §24.253. From the scope of the language found in Section 260.215, it appears that the legislature intended to give cities and counties the maximum permissible authority over the management of solid wastes. The only question is whether the police power may be extended to the requirement that wastes be disposed of at resource recovery facilities rather than at landfills.

The limiting factor in police power regulation, once the city or county is authorized to act on the subject matter, is whether the regulatory measure is reasonable. Bellerive Investment Co. v. Kansas City, 13 S.W.3d 628 (Mo. 1929); Flower Valley Shopping Center v. St. Louis County, 528 S.W.2d 749 (Mo. Banc 1975). The Missouri courts have held that a city may validly

restrict collection of garbage and refuse within the city to a single scavenger or waste hauler. Valley Spring Hog Ranch v. Plagmann, 220 S.W. 1 (Mo. Banc 1920); Harper v. Richardson, 297 S.W. 141 (K.C.Ct.App. 1927). It is also reasonable for a city to require all householders to pay a service charge for collection of solid wastes, whether or not an individual householder desires or uses the collection service. Craig v. City of Macon, supra.

While no case from a Missouri court or any other jurisdiction has directly addressed the issue at hand, it is clear from the cases cited above that the Missouri courts have given local governments wide latitude in dealing with threats to public health and welfare. As stated in Craig v. City of Macon, supra, at 775:

> "'When a city is given the power to do a certain thing it is necessarily left with large discretion as to the method to be adopted and the manner in which it is to be done.' Wilhoit v. City of Springfield, 237 Mo.App. 775, 171 S.W.2d 95, 98 (1943), . . ."

Moreover, a presumption of reasonableness attaches to police power ordinances. Craig v. City of Macon, supra.

We are aware of the argument that recycling of solid wastes results in fewer health hazards and pollution problems than does disposal of the same types of wastes in landfills. Some would also argue that public welfare is better served by burning solid wastes for generation of electricity, thus conserving scarce natural resources. We believe that these considerations, if true, could legitimately be taken into account by the governing body of a city or county in making a legislative choice as to the most desirable method of disposing of solid waste.

The police power is not rigid and inflexible. It must of necessity be somewhat elastic in order to meet changing conditions in our complex society. Graff v. Priest, 201 S.W.2d 945 (Mo. 1947), cert. denied, 332 U.S. 770. Whether a city or county desires to require recycling of some or all solid

wastes generated within its jurisdiction is a legislative choice. However, in light of the recognized health hazards presented by garbage and refuse, and the latitude given to local governments in dealing with such problems, Craig v. City of Macon, supra, we cannot say that such a choice would be unreasonable, or that the mandatory recycling of solid waste is not rationally related to the protection of public health and welfare. We believe that the police power is sufficiently broad to contemplate new methods of handling and disposing of the wastes generated daily in our industrialized society.

We make no attempt in this opinion letter to determine whether a city or county can require that solid wastes be disposed of at a particular resource recovery facility, to the exclusion of other approved facilities of a similar nature. The question is beyond the scope of the request. Moreover, resolution of the question would involve an analysis of the specific facts of the case, which facts are not before us.

It is our view that a city or county may, pursuant to the police powers granted to it by Section 260.215, RSMo Supp. 1975, require that all solid wastes, or certain categories thereof, generated within the jurisdiction of the city or county be disposed of at approved solid waste recovery facilities, rather than be buried at landfills.

Yours very truly,

JOHN ASHCROFT
Attorney General

DEPUTIES:
SHERIFFS:
COUNTY COURT:
COMPENSATION:

The sheriff of a first class county without a charter form of government has the exclusive authority to hire or fire deputies, assistants, and other employees in his office and to establish the compensation for his staff within the limits of the allocations made for that purpose by the county court.

OPINION NO. 191

October 7, 1977

Mr. Jerome E. Brant
County Counselor of Clay County
17 East Kansas
Liberty, Missouri 64068

Dear Mr. Brant:

This letter is in response to your opinion request on the following question:

> "Does the Clay County Court have any authority to determine what deputies or other employees the sheriff of Clay County would hire, or any authority to set the salaries of deputy sheriffs, or other employees, within the sheriff's office?"

Clay County is a first class county without a charter form of government. Therefore, Section 57.201 applies to Clay County.

An applicable statute is Section 57.201, RSMo Supp. 1975, which states:

> "1. The sheriff of all counties of the first class not having a charter form of government shall appoint such deputies, assistants and other employees as he deems necessary for the proper discharge of the duties of his office and may set their compensation within the limits of the allocations made for that purpose by the county court. The compensation for the deputies, assistants and employees shall be paid in equal installments out of the county treasury in the same manner as other county employees are paid.
>
> "2. The deputies, assistants and employees shall hold office at the pleasure of the sheriff."

It is the intent of the legislature to clearly require that the sheriff of all counties of the first class not having a charter form of government appoint his deputies, assistants, and other employees and set their compensation within the limits of the allocations made for that purpose by the county court. Deference should be paid to the manifest legislative intent. In construing statutes, the object is to ascertain the intent of the legislature from the plain words in the enactment.

In addition to Section 57.201.1, it is noted that Section 57.201.2 requires that all deputies, assistants, and employees hold office at the pleasure of the sheriff. This further manifests the intent of the legislature to give complete supervisory authority including the authority to hire and fire to the sheriff in relation to his deputies, assistants, and employees.

We now turn to the matter of compensation of these employees. The language in Section 57.201.1 indicates that the sheriff "may" set their compensation within the limits of the allocations made for that purpose by the county court. We note that Section 50.540.4, RSMo 1969, provides that the budget officer of a first class county shall recommend and the county court shall fix all salaries of employees other than those established by law. It is our view that Section 57.201.1 establishes by law that the sheriff in counties of the first class not having a charter form of government may set the compensation of the employees within the limits of the allocation made for that purpose by the county court. It is noted, however, that any compensation established by the sheriff for his deputies, assistants, and other employees is subject to the limits of the allocation made for that purpose by the county court.

CONCLUSION

It is the opinion of this office that the sheriff of a first class county without a charter form of government has the exclusive authority to hire or fire deputies, assistants, and other employees in his office and to establish the compensation for his staff within the limits of the allocations made for that purpose by the county court.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Terry C. Allen.

Yours very truly,

JOHN ASHCROFT
Attorney General

October 24, 1977

OPINION LETTER NO. 192
Answer by Letter - Hyatt

FILED
192

Honorable James I. Spainhower
State Treasurer
Room 229, Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Spainhower:

This letter is issued in response to your opinion request asking whether the state treasurer has the responsibility to perform certain duties assigned to him by House Committee Substitute for Senate Substitute for Senate Bill 234, enacted by the 79th General Assembly. For the purpose of brevity, we will refer to this legislation as the County Sales Tax Act. Generally, this act enables the governing body of certain counties to impose a sales tax for the benefit of the county upon a favorable vote of the citizens thereof. If the sales tax is imposed by the governing body of the county, no city sales tax may be imposed by any city, town or village located wholly or partially within the county. The tax is to be implemented generally in accordance with the state sales tax laws set forth in Sections 144.010 to 144.510, RSMo, and is to be collected by the director of revenue.

Section 5(1) of the County Sales Tax Act requires the state treasurer to deposit the taxes collected by the director of revenue in a special trust fund to be known as the "County Sales Tax Trust Fund." Section 5(1) goes on to state:

> " . . . The moneys in the county sales tax trust fund shall not be deemed to be state funds and shall not be commingled with any funds of the state. . . ."

The treasurer is further required to distribute the funds to the county and to its cities, towns and villages according to the method prescribed. In addition, under Section 5(4), the director of revenue may authorize the state treasurer to make refunds from the amounts in the trust fund, and if the tax is abolished, the director of revenue shall authorize the state treasurer under certain circumstances to remit the balance in the account of the county and to close the account of that county.

In 1969, the General Assembly enacted the City Sales Tax Act, now codified in Sections 94.500 to 94.570, RSMo. The duties imposed on the state treasurer by that act were identical in all relevant respects to the duties imposed by the new County Sales Tax Act being considered here. Additionally, the City Sales Tax Act provides for the establishment of a city sales tax trust fund which is similarly "not to be deemed state funds." Section 94.550(1), RSMo.

In Opinion No. 110 (1970), a copy of which is enclosed, this office ruled that the legislature could not impose such duties on the state treasurer by reason of Article IV, Section 15 of the Missouri Constitution, which provides in part:

> " . . . No duty shall be imposed on the state treasurer by law which is not related to the receipt, investment, custody and disbursement of state funds." (Emphasis supplied)

Because the city sales tax act expressly declared that the moneys collected thereunder were not to be deemed state funds, Opinion No. 110 ruled that the duties imposed on the state treasurer by that act were violative of the above-quoted constitutional provision.

Opinion No. 110 went on, however, to conclude that the portion of the City Sales Tax Act imposing unconstitutional duties on the state treasurer could be severed from the balance of the act. Based on the reasoning of that opinion and the similarity between the two acts, we conclude that the legislature may not impose the duties set forth in the County Sales Tax Act upon the state treasurer, but that the portion of the act imposing these duties can be severed from the balance of the act.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enclosure

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

September 27, 1977

OPINION LETTER NO. 194

Honorable Steven M. Gardner
Representative, 92nd District
609 Twigwood Drive
Ballwin, Missouri 63011

Dear Mr. Gardner:

This letter is in response to your question asking as follows:

> "A. May a Fire Protection District, located in a First Class County, add territory and extend its limits beyond the boundaries of the First Class County?
>
> "B. Does the answer to the previous question vary, according to whether the Fire Protection District was incorporated before or after 1969?"

We are enclosing a copy of our Opinion No. 335-1970 which is self-explanatory. We believe that the reasoning of that opinion is applicable to the first question that you ask.

Although that opinion referred specifically to third class counties, the powers of the board of directors of fire protection districts in first class counties are provided for in Section 321.600, RSMo, which states, similarly to the powers quoted in Opinion No. 335-1970, regarding Section 321.220, RSMo, that the prosecuting attorney for the county in which the fire protection district is located shall prosecute such violations in magistrate court of that county.

The other sections relied upon in such opinion are applicable to first class counties. We find no statutory changes since that opinion was rendered in 1970 to affect the conclusion reached.

Therefore, in answer to your first question, the fire protection district located in a first class county does not have the authority to extend its limits beyond the boundaries of the first class county.

In answer to your second question, we find no reason to distinguish a fire protection district incorporated before or after 1969 with respect to such powers. Therefore, we conclude that such a fire protection district located in a first class county, incorporated before or after 1969, does not have authority to now extend its limits beyond the boundaries of the county.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Enclosure: Op. No. 335,
7/1/70, Parrish

LAGERS:
PENSIONS:
COMPREHENSIVE EMPLOYMENT AND TRAINING ACT:

1. A political subdivision which is a member of the Missouri Local Government Employees' Retirement System (LAGERS) may not withhold from LAGERS the employer's share of contributions for full-time employees whose salaries are funded through the Comprehensive Employment and Training Act of 1973. 2. The Missouri Local Government Employees' Retirement System (LAGERS) may not refund to a political subdivision the employer's contributions attributable to any such employee who terminates his employment prior to the vesting of his benefits.

OPINION NO. 196

November 30, 1977

FILED
196

Honorable Thomas M. Keyes
State Auditor
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Keyes:

This is to acknowledge receipt of your request for a formal opinion of this office which reads as follows:

> "May a political subdivision which is a member of the Missouri Local Government Employees' Retirement System (LAGERS) withhold from LAGERS the employer's share of contributions for full-time employees whose salaries and fringe benefits are funded through the Comprehensive Employment and Training Act of 1973 (CETA) until such time as the benefits for such employees vest?
>
> "If the answer to the preceding question is no, may LAGERS refund to the political subdivision the employer's contributions attributable to any such employee who terminates his employment prior to the vesting of his benefits?"

First of all, it should be noted that this opinion is applicable only to those full-time employees whose salaries are funded through the Comprehensive Employment and Training Act of 1973 (CETA). In addition, by the term "fringe benefits" the assumption is made that you are referring to retirement benefits.

In the opinion request, it is indicated that announced regulations of the U.S. Department of Labor regarding the use of Comprehensive Employment and Training Act (CETA) monies require a reserve funding method to be applied to contributions for retirement benefits. Under such method, employer contributions paid from CETA funds must be set aside in a separate reserve account and may be transferred into the retirement system only if the employee's benefits become vested or the employee becomes an unsubsidized employee (no longer paid using CETA funds). It is further our understanding that these regulations became effective on October 1, 1977, but that a prime sponsor or eligible applicant which is in a state whose law prevents the implementation of procedures required by Section 98.25 may request an extension. However, such extension may be granted only upon a showing by an opinion of the State Attorney General that: (1) the state legislature must change or modify a particular state law or laws so that the prime sponsor or eligible applicant may comply with Section 98.25 of the regulations in its use of CETA funds; (2) the procedures of Section 98.25 of the regulations may not be legally implemented by order of the Governor or by other executive authorities; and (3) the necessary changes and modifications cannot be completed by October 1, 1977.

With the above principles in mind, the statutes relating to the operation of Local Government Employees' Retirement System, commonly referred to as LAGERS, are found in Sections 70.600 through 70.760, of the Missouri Revised Statutes. In this regard, the terms "employee" and "employer" are defined in part in subsections (10) and (11) of Section 70.600, RSMo Supp. 1975, as follows:

> "(10) 'Employee', any person regularly employed by a political subdivision who receives compensation from the political subdivision for personal services rendered the political subdivision,. . .
>
> "(11) 'Employer', any political subdivision which has elected to have all its eligible employees covered by the system;"

Similarly, the composition of the membership of LAGERS, is set forth in Section 70.630, RSMo Supp. 1975, and provides in part as follows:

> "1. The membership of the system shall include the following persons:
>
> (1) All employees who are neither policemen nor firemen who are in the employ of a political subdivision the day preceding the date such political subdivision becomes an employer and who continue in such employ on and after such date shall become members of the system.
>
> (2) All persons who become employed by a political subdivision as neither policemen nor firemen on or after the date such political subdivision becomes an employer shall become members of the system."

As a result of the above-statutory provisions, we conclude that if a political subdivision elects to have all its eligible employees covered by LAGERS, then the individual employee is required to participate in LAGERS and the political subdivision may not withhold from LAGERS the employer's share of contributions for full-time employees whose salaries and fringe benefits are funded through CETA. In so holding, we need not and do not resolve the question of whether or not retirement benefits as to this retirement system are gratuities or deferred compensation. See Police Retirement System of Kansas City v. City of Kansas City, Missouri, 529 S.W.2d 388 (Mo. 1975). Further, we are of the view that the procedures of Section 98.25 of the regulations may not be legally implemented by an order of the Governor, the reason being that an executive order is not a "law." See State ex rel McKittrick v. Missouri Public Service Commission, 175 S.W.2d 857, 861 (Mo. Banc 1943).

In response to your second question, the statutory provisions relating to employer's contributions are found in Section 70.730, RSMo 1969. In reviewing these statutory provisions, we find no authority for LAGERS to refund to a political subdivision the employer's contributions attributable to any employee who terminates his employment prior to the vesting of his benefits.

CONCLUSION

It is the opinion of this office that:

1. A political subdivision which is a member of the Missouri Local Government Employees' Retirement System (LAGERS) may not withhold from LAGERS the employer's share of contributions for full-time employees whose salaries are funded through the Comprehensive Employment and Training Act of 1973.

2. The Missouri Local Government Employees' Retirement System (LAGERS) may not refund to a political subdivision the employer's contributions attributable to any such employee who terminates his employment prior to the vesting of his benefits.

The foregoing opinion, which I hereby approve, was prepared by my assistant, B. J. Jones.

Yours very truly,

John Ashcroft

JOHN ASHCROFT
Attorney General

December 28, 1977

OPINION LETTER NO. 199
Answer by letter-Wieler

FILED
199

Honorable Samuel C. Jones
Prosecuting Attorney
Lawrence County
P. O. Box 246
Mt. Vernon, Missouri 65712

Dear Mr. Jones:

This letter is in response to your request for an opinion as to the permissible length for use on the highways of this state of a vehicle consisting of a self-propelled motor vehicle designed for carriage of freight as well as for drawing of a semi-trailer, and capable of being used for such purposes separately or simultaneously, when such vehicle is used in combination with a semi-trailer.

Section 304.170, RSMo Supp. 1975, sets up the applicable length limits for motor vehicles in this state. Subsection 5 of Section 304.170, states as follows:

> "No combination of truck-tractor and semi-trailer operated upon the highways of this state shall have a length, including load, in excess of fifty-five feet, except that such a combination specially designed to transport motor vehicles may itself have a length, including load, of sixty feet."

Subsection 6 of Section 304.170 states as follows:

> "No other combination of vehicles operated upon the highways of this state shall have an overall length, unladen or with load, in

> excess of sixty-five feet on state primary highways or on interstate routes plus a distance not to exceed five miles from any state primary or interstate highway or in excess of fifty-five feet on any other highway; provided, however, the state highway commission may designate additional routes for use by such sixty-five foot combination; provided, further, any vehicle or combination of vehicles transporting automobiles or other motor vehicles may carry a load which extends no more than three feet beyond the front and four feet beyond the rear of the transporting vehicle or combination of vehicles."

The definitions applicable to the terms set forth above are contained in Section 301.010, RSMo Supp. 1975. Subsection (28) of Section 301.010 defines the term "truck-tractor" as a self-propelled motor vehicle designed for drawing other vehicles, but not for the carriage of any load when operating independently. Subsection (29) of Section 301.010 defines "trailer" as any vehicle without motive power designed for carrying property or passengers on its own structure while being drawn by a self-propelled vehicle. This definition includes a semi-trailer of the type designed and used in conjunction with a self-propelled vehicle where a considerable part of its own weight rests upon and is carried by the towing vehicle. Subsection (30) of Section 301.010 defines "truck" as a motor vehicle designed or used for the transportation of property.

In your opinion request, you ask whether the above-described vehicle is limited to fifty-five feet in length under the provisions of subsection 5 of Section 304.170, or whether such vehicle can have a length of sixty-five feet on certain highways in accordance with the provisions of subsection 6 of Section 304.170. The question of whether or not a towing vehicle meets the definition of "truck-tractor" or the definition of "truck" is a factual one. Obviously, the attachment of a sham or makeshift freight compartment to a towing unit designed for drawing other vehicles and not for the carriage of any load when operating independently would be insufficient to change the character of that unit from a "truck-tractor" to a "truck." However, from the description given, it seems clear that the towing vehicle in this instance is not simply a vehicle designed for pulling a trailer but rather a vehicle designed for the carriage of freight in addition to use as a towing vehicle. This being so, the definition of "truck-tractor" as used in subsection 5 of Section 304.170,

is not applicable. This vehicle is designed for the carriage of freight when operated independently. Therefore, the combination of such a towing unit and a semi-trailer would constitute a "combination of vehicles" as such term is used in subsection 6 of Section 304.170. Such a combination could be operated at a length of sixty-five feet over state primary highways or on interstate routes plus a distance not to exceed five miles from any state primary or interstate highway, or any additional route designated for such use by the State Highway Commission.

Very truly yours,

JOHN ASHCROFT
Attorney General

GOVERNOR:
OFFICERS:
STATE OFFICERS:
CONSTITUTIONAL LAW:

Under the provisions of Section 51 of Article IV of the Missouri Constitution, a nomination made during a session of the Senate is not subject to the constitutional thirty-day limitation in which the Senate must act since such limitation is applicable only to appointments made when the Senate is not in session. The Governor has authority to withdraw the nomination of a person made during a session of the Senate at any time prior to adjournment of the Senate if the Senate has not acted on such nomination.

OPINION NO. 203

November 22, 1977

FILED
203

Honorable J. B. Banks
State Senator, 5th District
c/o Senate Post Office
State Capitol Building
Jefferson City, Missouri 65101

Dear Senator Banks:

This opinion is in response to your questions asking for an interpretation of Section 51 of Article IV of the Missouri Constitution relative to the Governor's powers of appointment. For the sake of clarity, we set out the questions asked immediately prior to our response to such questions.

Section 51 of Article IV of the Constitution provides:

> "The appointment of all members of administrative boards and commissions and of all department and division heads, as provided by law, shall be made by the governor. All members of administrative boards and commissions, all department and division heads and all other officials appointed by the governor shall be made only by and with the advice and consent of the senate. The authority to act of any person whose appointment requires the advice and consent of the senate shall commence, if the senate is in session, upon receiving the advice and consent of the senate. If the senate is not in session, the authority

> to act shall commence immediately upon appointment by the governor but shall terminate if the advice and consent of the senate is not given within thirty days after the senate has convened in regular or special session. If the senate fails to give its advice and consent to any appointee, that person shall not be reappointed by the governor to the same office or position."

Your first question states:

> "1. Under the provisions of section 51 of article IV of the constitution of Missouri, when a person serving in an appointive position for a term certain is reappointed to that position for an additional term at the expiration of the first term, and when the Senate is in session, does such person serve as a continuation of the first term until such time as his reappointment is confirmed, or does his second term commence immediately upon appointment subject to termination if consent is not given?"

It is clear that the appointment of a person when the Senate is in session does not entitle the person to take office. Since the individual has not assumed office the "appointment" is essentially a mere nomination to the office which requires the approval of the Senate before such person can act. Thus, the procedure while the Senate is in session is similar to that procedure followed by the President of the United States and the Congress under the United States Constitution. See Marbury v. Madison, 5 U.S. (1 Cranch) 49, 2 L.Ed. 60 (1803). Such a procedure is in direct contrast to that which would be followed where the Senate is not in session. See McChesney v. Sampson, 23 S.W.2d 584 (Ky.App. 1930); State ex rel. Sikes v. Williams, 121 S.W. 64 (Mo. 1909). When a nomination is made during a session of the Senate to fill a vacancy caused by the expiration of a term the incumbent of the office holds over under Section 12 of Article VII of the Missouri Constitution, which provides:

> "Except as provided in this Constitution, and subject to the right of resignation, all officers shall hold office for the term thereof, and until their successors are duly elected or appointed and qualified."

Therefore, in answer to your first question, when such person is appointed while the Senate is in session, such person is merely nominated and the nomination itself does not constitutionally qualify the person to take office which means simply that the incumbent remains in office pursuant to Section 12 of Article VII, above quoted. During the period pending Senate approval it makes no difference whether the incumbent is the same person who is so nominated. Such a person nominated during a session does not take office until such person receives Senate approval.

Your second question asks:

> "2. When a person serving in an appointive position for a term certain is reappointed to that position for an additional term at the expiration of the first term, and when the Senate is in session, but the reappointment is withdrawn by the governor prior to senate action or confirmation, but more than thirty (30) days after the appointment was submitted to the senate, does the withdrawal of the appointment create a tolling of the provisions of article IV, section 51 specifying a time period for confirmation, thereby resulting in such person remaining in office as a continuation of the first term? Or did the right to serve terminate thirty (30) days after the convening of the senate with no confirmation of the reappointment being made?"

The thirty-day time limitation to which you refer as provided in Section 51 of Article IV, refers only to the appointment of persons when the Senate is not in session. This is evident from the express language of the provision which we have quoted in the second to the last sentence of the above section. The thirty-day limitation does not apply to nominations made when the Senate is in session.

In our view the Governor has the authority to withdraw a nomination made when the Senate is in session at any time before adjournment of the Senate if the Senate has not acted on such nomination. Such a nominee who is already an incumbent holding over under the provisions of Section 12 of Article VII of the Constitution has the right to continue to hold over under such section after the Governor withdraws the nomination.

Your third question asks:

> "3. Under the circumstances outlined above:
>
> (a) Would such person be eligible for another appointment to the same position notwithstanding the fact that the senate had failed to act on the prior appointment within thirty (30) days after the submission thereof?
>
> (b) If not, would the fact that such person would not be eligible for a later such appointment affect the right, if any, as the person otherwise would have to occupy the position until a successor is appointed and qualified?"

We expressed our view that the thirty-day limit does not apply to nominations which are made while the Senate is in session. Assuming that such person's name is withdrawn by the Governor prior to the end of the regular or special session and prior to rejection by the Senate, the person would be eligible for further nomination to the same position.

Your fourth question asks:

> "4. Is there any limit to how long a person can continue to serve pending the appointment and qualification of a successor?"

Generally there is no limit as to how long a person can continue to serve pending the nomination and qualification of a successor. Section 12 of Article VII of the Missouri Constitution seems clear in this respect.

However, in the absence of a precise factual situation and in view of the dearth of legal precedent, we will not speculate as to how the courts would rule if an incumbent is nominated during a session but fails to receive Senate approval or is rejected by the Senate. If an incumbent is appointed to office during a recess he succeeds himself pending approval by the Senate within thirty days of the beginning of the session, and if not so approved, has no authority to hold over by virtue of his prior incumbency which terminated at the time of his later appointment.

CONCLUSION

It is the opinion of this office that under the provisions of Section 51 of Article IV of the Missouri Constitution, a nomination made during a session of the Senate is not subject to the constitutional thirty-day limitation in which the Senate must act since such limitation is applicable only to appointments made when the Senate is not in session. The Governor has authority to withdraw the nomination of a person made during a session of the Senate at any time before adjournment of the Senate if the Senate has not acted on such nomination.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

JOHN ASHCROFT
Attorney General

BONDS:
SCHOOLS:
STATE AUDITOR:

The State Auditor does have authority to register refunding building bonds of the Sedalia School District No. 200 of Pettis County, Missouri. Our opinion is limited solely to the facts presented.

OPINION NO. 204

December 29, 1977

FILED
204

Honorable Thomas M. Keyes
State Auditor
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Keyes:

This opinion is in response to your question asking:

> "Should the State Auditor's Office register $1,770,000 Refunding Building Bonds of Sedalia School District No. 200 of Pettis County, Missouri?"

The facts as they appear from your correspondence and correspondence of attorneys representing the school district are that the State Auditor's Office has been asked to register advance refunding bonds. The proceeds from the sale of the bonds will be invested in United States Government securities which have maturity dates corresponding with the dates on which the originally issued bonds mature or are callable. The original bonds are general obligation bonds with a redemption call feature. As provided by law, they were issued on October 14, 1970; and a principal balance of $1,870,000 remains outstanding. The unpaid bonds mature from 1978 to 1990 at an average annual interest rate of 6.1015%. The refunding building bonds as authorized under the resolution of the Sedalia School District No. 200 bear an average annual interest rate of 5%. An escrow trust agreement has been executed and the proceeds of the refunding bond will be deposited in the escrow trust account with authority of the escrow trustee to invest the proceeds in United States Government securities. Upon the payment in full, the principal of and interest on the outstanding bonds, all remaining moneys and escrow securities in the escrow account, together with any interest thereon, shall be transferred to the school district sinking fund created and maintained exclusively for the purpose of holding funds to pay the principal and interest on all of the school district's outstanding general obligation bonds. A number of the outstanding bonds will mature between

the writing of this opinion and the redemption call which is eight years hence. The refunding bonds will be used to retire the outstanding bonds as they mature. Any remaining outstanding bonds shall be redeemed under the redemption call eight years from the date of issuance of the refunding bonds. None of the proceeds from the refunding bond issue including interest shall be used for any other purpose.

Section 108.240, RSMo 1969, requires that any bond hereafter issued by any school district in order to be valid must be first presented to the State Auditor who shall register the same as required by law.

Applicable law includes Article VI, Section 28 of the Missouri Constitution, which says:

> "For the purpose of refunding, extending, and unifying the whole or any part of its valid bonded indebtedness any county, city, school district, or other political corporation or subdivision of the state, under terms and conditions prescribed by law may issue refunding bonds not exceeding in amount the principal of the outstanding indebtedness to be refunded and the accrued interest to the date of such refunding bonds. The governing authority shall provide for the payment of interest at not to exceed the same rate, and the principal of such refunding bonds, in the same manner as was provided for the payment of interest and principal of the bonds refunded."

Section 164.191, RSMo 1969, provides in part:

> "The board of any school district may issue funding and refunding bonds for the district, in accordance with sections 108.140 to 108.170, RSMo. . . ."

Section 164.201, RSMo 1969, provides in part:

> ". . . The board also may sell the refunding or renewal bonds for cash if in its judgment it will be to the interest of the school district; . . . and all sums of money

> realized from the sale of refunding or renewal bonds shall be used in the redemption of outstanding bonds of the school district."

Section 108.140, RSMo 1969, provides:

> "The various counties in this state for themselves, as well as for and on behalf of any township, or other political subdivision for which said counties may have heretofore issued any bonds, and the several cities, school districts or other political corporations or subdivisions of the state, are hereby authorized to refund, extend, and unify the whole or part of their valid bonded indebtedness, or judgment indebtedness, and for such purpose may issue, negotiate, sell and deliver refunding bonds and with the proceeds therefrom pay off, redeem and cancel the bonds to be refunded as the same mature or are called for redemption, or pay and cancel such judgment indebtedness, or such refunding bonds may be issued and delivered in exchange for and upon surrender and cancellation of the bonds and coupons refunded thereby, or such judgment indebtedness. In no case shall said refunding bonds exceed the amount of the principal of the outstanding bond or judgment indebtedness to be refunded and the interest accrued thereon to the date of such refunding bonds. No refunding bond issued as provided herein shall be payable in more than twenty years from the date thereof and such refunding bonds shall be of the denomination of not more than one thousand dollars nor less than one hundred dollars each, and shall bear interest not to exceed the same rate as the bonds refunded, or judgment indebtedness, payable annually or semiannually, and to this end each bond shall have annexed thereto interest coupons, and such bonds and coupons shall be made payable to bearer; provided, that nothing in this section shall be so construed as to prohibit any county, city, school district, or other political corporation or subdivision of the

> state from refunding its bonded indebtedness without the submission of the question to a popular vote." (Emphasis added)

In the matter at hand, the problem is issuing refunding bonds eight years in advance of the redemption call of the outstanding bonds while paying off some of the outstanding bonds as they mature during the eight year period. There appears to be no question under the above statutes and cases herein cited that refunding bonds can be legitimately issued by a school district. The question is can this type of refunding bond be so issued? Significant in this regard is State ex rel. St. Charles County v. Smith, 152 S.W.2d 1 (Mo.Banc 1941), involving an issue of toll bridge revenue refunding bonds. The refunding bonds were to be issued two months prior to the call date for the outstanding bonds to be redeemed. During the two month period, the proceeds from the sale of the refunding bonds were to be held by a bank exclusively for the purpose of paying off the outstanding bonds on the call date. The court therein concluded that it was impractical to provide for cancellation of outstanding bonds simultaneously with the issue of the refunding bonds and further stated:

> ". . . ' . . . All this should be done as expeditiously as circumstances will permit but the fact that there is a reasonable lapse between the maturity of the outstanding bonds and the issue of the refunding bonds in no sense increases the indebtedness or makes outstanding both sets of bonds at the same time.'" Id. at 7

Thus, the court further concluded that refunding bonds are not indebtedness in violation of the double debt prohibition in the Constitution.

In the case at hand, the proceeds of the refunding bonds are invested for an eight year period rather than being held for a shorter period of time until the remaining outstanding bonds are be called as in the Smith case. Some of the outstanding bonds mature and are refunded during the eight year period. Pursuant to Section 108.140, the outstanding bonds are being paid off as they mature with proceeds of the refunding bonds.

Other jurisdictions have considered the problem. City of Albuquerque v. Gott, 389 P.2d 207 (N.M. 1964); State v. City of Melbourne, 93 So.2d 371 (Fla. 1957); Rodin v. State, 417 P.2d 180 (Wyo. 1966); Beaumont v. Faubus, 394 S.W.2d 478 (Ark. 1965).

These states have approved refunding bond issues in similar circumstances ranging from several years to fifteen years in lapse of time from the issue of the refunding bonds to the redemption or maturing of the outstanding bonds. There is no Missouri case precisely on all fours with the facts in this opinion. We are limiting our opinion to the precise facts.

It has been suggested that Sections 108.140 through 108.170 be compared to Sections 108.400 and 108.405, RSMo Supp. 1975. A comparison reveals that the latter sections do not pertain to the subject matter of this opinion. They pertain to counties of the first class having a charter form of government and a particular type of refunding bond in connection with such counties solely. Section 108.405 places a limitation n such refunding bonds which is dissimilar to the Section 108.140 bonds. Thus, we do not believe Sections 108.400 and 108.405 to be applicable to this opinion.

In the cases which we have reviewed including the Smith case and cases in other jurisdictions, one main theme permeates the entire area. The theme is to consider the resulting savings to the taxpayers in the issuance of the refunding bonds. We are aware that there is a resulting savings in this case in excess of $200,000 to the taxpayers of the Sedalia School District. Our view rests on the premise that the school district has committed the proceeds of the refunding bond including interest to the payment of the outstanding bonds. By doing so, prior to the redemption call the district is able to take advantage of a favorable market place and save the taxpayers a substantial amount of money. The district cannot use the refunding bonds for any other purpose which would deny the taxpayers an opportunity to vote on a new program as contemplated by law. Thus, there must be a binding escrow agreement creating the sinking fund to insure that the proceeds and interest are properly used.

Having reviewed the statutes, related cases, and public policy, our view is that the refunding bonds contemplated by the Sedalia School District No. 200 are proper and that the State Auditor should proceed to register them.

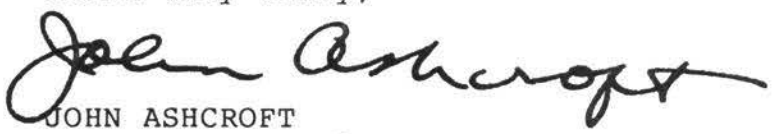
CONCLUSION

It the opinion of this office that the State Auditor does have authority to register refunding building bonds of the Sedalia School District No. 200 of Pettis County, Missouri. Our opinion is limited solely to the facts presented.

Honorable Thomas M. Keyes

The foregoing opinion, which I hereby approve, was prepared by my assistant, Terry C. Allen.

Yours very truly,



JOHN ASHCROFT
Attorney General

RECORDER OF DEEDS:
UNIFORM COMMERCIAL CODE:

Section 59.310, as amended by Senate Bill No. 112, First Regular Session, 79th General Assembly, requires the print on any document to be recorded by the recorder of deeds to be 8 point and that if any document contains type smaller than 8 point such document must be accompanied by an exact typewritten copy thereof which will be recorded contemporaneously with the document.

OPINION NO. 205

December 13, 1977

FILED
205

Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
Capitol Building, Room 211
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

This opinion is in response to your question asking:

> "Does Section 59.310, as amended by S.B. 112, apply to U.C.C. financing statements?
>
> If so, does 59.310 prohibit county recorders from accepting for recording, U.C.C. financing statements which are printed in type smaller that 8 point?
>
> If Section 59.310 is applicable to U.C.C. financing statements and does not prohibit county recorders from accepting U.C.C. financing statements which are printed in type smaller than 8 point, would the recording be valid to perfect a security interest?"

Senate Bill No. 112 of the First Regular Session, 79th General Assembly, amended Section 59.310, RSMo 1969 and enacted a new section with the same number.

Subsection 1(2) of amended Section 59.310 provides:

> "The size of print or type on any document to be recorded shall not be smaller than 8 point. Should any document to be recorded contain type smaller than 8 point,

> such document must be accompanied by an exact typewritten copy thereof which will be recorded contemporaneously with the document;"

It is our view that the above provisions make it quite clear that the size of print or type on any document to be recorded shall not be smaller than 8 point and that if any document contains type smaller than 8 point it must be accompanied by an exact typewritten copy of the document. Thus, if a portion of the print is smaller than 8 point the entire document must be accompanied by an exact typewritten copy. However, we do not believe that this requirement includes parenthetical instructional information.

We note that the Uniform Commercial Code and actual past practice has distinguished between filing and recording in the recorder's office. Insofar as recording is concerned it is our view that this section is applicable to uniform commercial code documents which are to be recorded in the office of the recorder of deeds. Such uniform commercial code documents which are merely filed as distinguished from recorded by the recorder of deeds need not be in such type.

CONCLUSION

It is the opinion of this office that Section 59.310, as amended by Senate Bill No. 112, First Regular Session, 79th General Assembly, requires the print on any document to be recorded by the recorder of deeds to be 8 point and that if any document contains type smaller than 8 point such document must be accompanied by an exact typewritten copy thereof which will be recorded contemporaneously with the document.

The foregoing opinion which I hereby approve was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

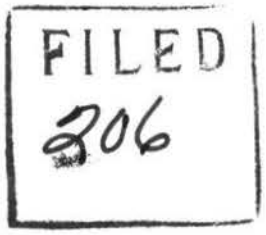
John Ashcroft

JOHN ASHCROFT
Attorney General

NOTARY PUBLIC: Under the provisions of Senate Substitute for House Bill No. 513, First Regular Session, 79th General Assembly, effective January 1, 1978, notaries public commissioned before January 1, 1978, and whose commissions extend beyond that date are not required to obtain the $10,000 bond required by Section 8 of such Act unless and until such notaries renew their commissions after the expiration of such terms of office. On and after January 1, 1978, such notaries are subject to the civil and criminal liability provided in Sections 32 through 38 of the Act and have statewide authority to perform notarial functions under Section 3 of the Act.

OPINION NO. 206

October 26, 1977



Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

This opinion is in response to several questions you have posed concerning Senate Substitute for House Bill No. 513, First Regular Session, 79th General Assembly, which becomes effective January 1, 1978. The first question you ask is:

> "1. If a notary public is commissioned before January 1, 1978, and has submitted the bond required by 486.050, RSMo 1969, is he required to submit a new bond to comply with Section 8.1, S.S.H.B. 513?"

Section 8.1 of S.S.H.B. No. 513 provides:

> "Before receiving his commission, each applicant shall submit to the county clerk of the county within and for which he is to be commissioned, an executed bond commencing at least 30 days after the date he submitted his application to the secretary of state with a term of four years, in the sum of $10,000.00 with, as surety thereon, a company qualified to write surety bonds in this state. The bond shall be conditioned upon the faithful performance of all notarial acts in accordance with this chapter."

Repealed Section 486.050, RSMo 1969, required that a notary public give a bond to the state in the sum of $2,000 except in counties of the first class in which they were required to give a bond in the sum of $5,000. Such section is in effect until January 1, 1978.

Section 43 of the Act provides:

> "Nothing in this act shall be construed in any way as interfering with or discontinuing the term of office of any person now serving as a notary public until the term for which he was commissioned has expired, or until he has been removed pursuant to the provisions of this act."

We note that subsection 1 of Section 8, quoted above, refers to applicants and we believe that such language indicates its inapplicability to incumbents. We also are of the view that the posting of a proper bond is a qualification for office and therefore Section 43, quoted above, is applicable and indicates the legislative intent that the bond requirement for incumbent notaries is not to be changed.

Your second question asks:

> "Is a notary public commissioned before January 1, 1978, subject to the civil and criminal liability, outlined in Sections 32 through 38, S.S.H.B. 513, for conduct occurring on or after January 1, 1978?"

Sections 32 through 38 provide as follows:

> "SECTION 32. 1. The maximum fee in this state for notarization of each signature and the proper recording thereof in the journal of notarial acts is $2.00 for each signature notarized.
>
> 2. The maximum fee in this state for certification of a facsimile of a document, and the proper recordation thereof in the journal of notarial acts is $2.00 for each 8 1/2 x 11 inch page retained in the notary's file.
>
> 3. The maximum fee in this state is $1.00 for any other notarial act performed.

4. No notary shall charge or collect a fee for notarizing the signature on any absentee ballot or absentee voter registration.

5. A notary public who charges more than the maximum fee specified or who charges or collects a fee for notarizing the signature on any absentee ballot or absentee voter registration is guilty of official misconduct.

"SECTION 33. A notary public and the surety or sureties on his bond are liable to the persons involved for all damages proximately caused by the notary's official misconduct.

"SECTION 34. The employer of a notary public is also liable to the persons involved for all damages proximately caused by the notary's official misconduct, if:

(1) the notary public was acting within the scope of his employment at the time he engaged in the official misconduct; and

(2) the employer consented to the notary public's official misconduct.

"SECTION 35. It is not essential to a recovery of damages that a notary's official misconduct be the only proximate cause of the damages.

"SECTION 36. 1. A notary public who knowingly and willfully commits any official misconduct is guilty of a misdemeanor and is punishable upon conviction by a fine not exceeding $500 or by imprisonment for not more than six months or both.

2. A notary public who recklessly or negligently commits any official misconduct is guilty of a misdemeanor and is punishable upon conviction by a fine not exceeding one hundred dollars.

"SECTION 37. Any person who acts as, or otherwise willfully impersonates, a notary public while not lawfully appointed and commissioned

> to perform notarial acts is guilty of a misdemeanor and punishable upon conviction by a fine not exceeding five hundred dollars or by imprisonment for not more than six months or both.
>
> "SECTION 38. Any person who unlawfully possesses a notary's journal, official seal or any papers or copies relating to notarial acts, is guilty of a misdemeanor and is punishable upon conviction by a fine not exceeding five hundred dollars."

It is our view that these civil and criminal liability sections will apply on and after January 1, 1978, to notaries commissioned before January 1, 1978, as well as to those commissioned after January 1, 1978.

Your third question asks:

> "Does a notary public commissioned before January 1, 1978, have authority under Section 3, S.S.H.B. 513, to perform notarial functions statewide or do they continue to follow provisions in present law which states that the notary may perform functions in the county for which they are appointed and adjoining counties and counties in which they have filed certified copies of their commission with the county clerk?"

Section 3 of the Act provides:

> "Each notary public may perform notarial acts anywhere within this state."

It is our view that Section 3 is applicable to notaries public commissioned before January 1, 1978, whose commissions extend beyond that date and that on and after January 1, 1978, such notaries public may perform notarial acts anywhere within this state.

CONCLUSION

It is the opinion of this office that under the provisions of Senate Substitute for House Bill No. 513, First Regular Session, 79th General Assembly, effective January 1, 1978, notaries public commissioned before January 1, 1978, and whose commissions

extend beyond that date are not required to obtain the $10,000 bond required by Section 8 of such Act unless and until such notaries renew their commissions after the expiration of such terms of office. On and after January 1, 1978, such notaries public are subject to the civil and criminal liability provided in Sections 32 through 38 of the Act and have statewide authority to perform notarial functions under Section 3 of the Act.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

November 1, 1977

OPINION LETTER NO. 208

Honorable Allan G. Mueller
State Senator, District 6
8626 Church Road
St. Louis, Missouri 63147

Dear Senator Mueller:

This is in response to your question asking whether the Bi-State Development Agency is an agency and instrumentality of the state of Missouri and whether Bi-State is entitled to interest earned on Urban Mass Transportation Administration Financial Assistance Funds pending project disbursement pursuant to Section 203 of Title II of the Intergovernmental Cooperation Act of 1968.

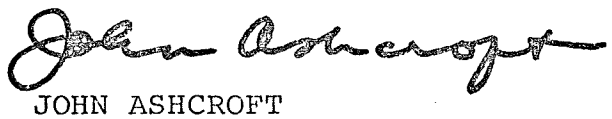
We are enclosing an opinion of this office issued to Senator Henry A. Panethiere, No. 181-1977. In that opinion, we concluded that the Kansas City Area Transportation Authority is an agency and instrumentality of the states of Missouri and Kansas.

We believe that the reasoning in that opinion is clearly applicable to the Bi-State Development Agency which is similarly an agency of Missouri and a sister state, Illinois. Bi-State, as you are well aware, was created under Sections 70.370, et seq., RSMo, and Chapter 127, Sections 63 r-1, et seq., Illinois Revised Statutes. The Compact was approved by Congress, 64 Stat. 568, in 1950.

Further, we note that the Bi-State Development Agency was assigned to the Missouri Department of Transportation under Section 14.2 of the Omnibus State Reorganization Act of 1974, RSMo Supp. 1975, Appendix B, p. 1274, and is an assigned agency of that department under the Department of Transportation Plan of Reorganization, RSMo Supp. 1975, Appendix C, p. 1331. Additionally, under such Plan the Agency works closely with the Division of Transit.

We conclude that the Bi-State Development Agency is an agency and instrumentality of the states of Missouri and Illinois and that Bi-State was clearly created prior to October 16, 1968, the effective date of Section 203 of the Intergovernmental Cooperation Act of 1968.

Yours very truly,



JOHN ASHCROFT
Attorney General

Enclosure: Op.Ltr.No. 181
Panethiere, 1977

See: State ex rel. Lack v. Melton, 629 S.W.2d 302 (Mo. banc 1985).

COMPENSATION:
ASSESSORS:
DEPUTIES:

The county assessor of a third class county retains authority to employ deputy and other clerical personnel subject to the approval by the county court of the amount authorized notwithstanding the amendment of Section 53.071, RSMo Supp. 1975, by the provisions of Senate Bill No. 277, First Regular Session, 79th General Assembly, effective January 1, 1978.

OPINION NO. 211

December 22, 1977

Honorable Meredith Ratcliff
Prosecuting Attorney
Adair County
Post Office Box 422
Kirksville, Missouri 63501

Dear Mr. Ratcliff:

This opinion is in response to your question asking:

> "I can find no provisions in Act 135 which provides for the appointment and payment of additional clerks or deputies in the County Assessor's office.
>
> "What is the status of such clerks and deputies under Act 135?"

We note that Adair County is a third class county.

Act 135, to which you refer, is Act 135 of Vernon's Missouri Legislative Service, 1977. Such reference sets forth the provisions of Senate Bill No. 277, First Regular Session, 79th General Assembly, which is effective January 1, 1978.

As you have noted, there were substantial amendments to Section 53.071, RSMo Supp. 1975, which give rise to your question. Section 53.071 was amended in pertinent part as follows, the brackets showing the relevant language which was omitted and the underscored portion showing the relevant matter added:

> "1. [For the performance of their existing statutory duties and for the additional duties set forth in sections 53.081 and 53.091, each county assessor, except in counties of

> the first class, shall receive an annual salary for his services and shall, subject to the approval of the county court, appoint the additional clerks and deputies that he deems necessary for the prompt and proper discharge of the duties of his office. A portion of each county assessor's salary and of the salaries for his clerks and deputies shall be paid by the state in an amount equal to the sum paid by the state for the assessor's, clerks', and deputies' compensation in that county in the year 1969, and the remainder of the assessor's salary and the salaries for his clerks and deputies shall be paid by his county.] The salary of each county assessor, except in counties of the first class, shall be determined as follows: . . ."

In the bill as initially introduced, there was no proposed provision expressly relating to the hiring of deputies and clerical help for the assessor. In the house committee substitute for the bill, while there was no express language pertaining to the authority of the assessor or the county court to hire such deputies and clerks, there was inserted a provision, which did not pass which required a general reassessment of all property subject to taxation by the county and which also provided that the governing body of the county shall provide the assessor with sufficient funds to carry out the provisions of the section. As noted, Section 2 of House Committee Substitute for Senate Bill No. 277 did not remain in the bill and was omitted before the bill was truly agreed to and finally passed. However, another section newly designated, Section 137.710, which was contained in the perfected version of the bill as well as House Committee Substitute and was in the bill as truly agreed to and finally passed, provided:

> "1. A portion of the salary for the prior year of the assessor, deputies, clerks, officers and other employees of all counties and cities not within a county charged with duties imposed by law upon assessors, their clerks, deputies, officers and employees shall be paid by the state. The state shall pay one-half of such salaries for the year 1976 and each year thereafter shall pay the amount paid for the previous year plus not more than a five percent increase over that amount, but the

> amount paid by the state shall in no year exceed one-half of the actual salaries.
>
> * * *
>
> "3. When the amount due has been determined by the state director of revenue, he shall pay such claims out of funds appropriated for that purpose."

In our Opinion No. 78, dated February 1, 1954, Saunders, this office held that the county court in counties of the third class may not employ clerical and stenographic personnel for the office of the assessor other than as provided in Section 53.095. Section 53.095, at that time, expressly authorized the county assessor in counties of classes three and four to appoint and fix the compensation of clerical or stenographic assistance as was necessary for the efficient performance of the duties of his office. Such compensation was to be paid from the county treasury subject to the approval of the county court and not to exceed a specified maximum. Section 53.095, however, was repealed by Laws of Missouri 1969, Third Extra Session, p. 78, Section 1, effective September 1, 1970, and in lieu thereof, Section 53.071, the section which is repealed and amended by Senate Bill No. 277, expressly provided that subject to the approval of the county court the assessor had the authority to appoint additional clerks and deputies that he deemed necessary for the prompt and proper discharge of the duties of his office. Such section also provided for the payment by the state of a portion of each county assessor's salary and the salaries of his clerks and deputies.

Section 53.060, RSMo, recognizes the authority of the assessor to appoint deputies by providing that the deputy assessors shall take the same oath and have the same power and authority as the assessor himself and that the assessor is responsible for the official actions of his deputies. Section 137.710, which we have quoted above from Senate Bill No. 277, is based on the premise that the county shall provide funds for payment of deputy assessors.

While it is our view that the authority of the assessor to appoint a deputy and to employ clerical assistance is not clearly and specifically provided for by statute after the effective date of Senate Bill No. 277, and is thus a proper subject for legislative action; it is also our view that the provisions which we have noted indicate that it was not the legislative intent to preclude the assessor from hiring deputies and assistants. The

county court would, of course, have to approve the amount authorized for such employees. We believe that the confusion which has resulted from the changes made by Senate Bill No. 277 simply indicates careless drafting combined with an apparent thought on the part of the drafters that the rearrangement of the subject matter covered the entire question of the payment of such employees as well as the authority to hire such employees.

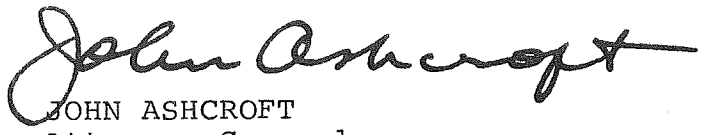
However, it is our conclusion that the legislature intended that the county assessor of such a county would have the authority to employ such personnel subject to the county court's approval of the amount authorized.

CONCLUSION

It is the opinion of this office that the county assessor of a third class county retains authority to employ deputy and other clerical personnel subject to the approval by the county court of the amount authorized notwithstanding the amendment of Section 53.071, RSMo Supp. 1975, by the provisions of Senate Bill No. 277, First Regular Session, 79th General Assembly, effective January 1, 1978.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,



JOHN ASHCROFT
Attorney General

COUNTY CLERKS:
COMPENSATION:

The reenactment of Section 150.070 in Senate Bill 277 of the First Regular Session of the 79th General Assembly, does not authorize the payment to the county clerk of any fees from the county provided for therein. Any fees received from the state by the clerk must be paid into the county treasury.

OPINION NO. 213

November 7, 1977

FILED
213

Honorable James. L. Russell
State Representative, 6th District
Rural Route 3
Savannah, Missouri 64485

Dear Representative Russell:

This opinion is in response to your question asking:

> "Does the reenactment of section 150.070 in Senate Bill No. 277 of the First Regular Session of the 79th General Assembly, impliedly repeal the provision in subsection 4 of section 51.300, RSMo Supp. 1975, stating: 'The salary provided in this section shall be the total compensation received by the county clerk', when the provisions of section 150.070 relating to county clerks are exactly the same as they were prior to this recent reenactment? (As this bill was introduced, there was no intent shown under the bracket and underline rule that the legislature was intending to amend the provisions of section 150.070 relating to the six cents allowed county clerks.)"

You also state:

> "Section 51.300, RSMo Supp. 1975, in subsection 4 states that the salary provided in this section shall be the total compensation of county clerks in second, third and fourth class counties. Section 150.070, as it has been repealed and reenacted in Senate Bill No. 277 of the First Regular Session of the 79th General Assembly, states: 'such clerk

> shall receive as compensation for making such tax book, copy, filing statements, and certifying the same the sum of six cents for each name or firm.....'. Does this recent reenactment of section 150.070 give county clerks in second, third and fourth class counties the six cents per name and firm along with their compensation under section 51.300, RSMo Supp. 1975, when the language in the reenacted section 150.070 is exactly the same as it was, as it refers to these county clerks, before the reenactment?"

The first paragraph of Section 150.070, to which you refer which was reenacted in Senate Bill 277, First Regular Session, 79th General Assembly, contains identically the same provisions as it did prior to repeal. In the course of passage it appears that the designation of that paragraph as subsection 1 was omitted and therefore Section 150.070 now begins without such numerical subsection designation but contains the following language which is identical to that which such subsection contained prior to the enactment of Senate Bill 277.

> "After the county board of equalization shall have completed the equalization of such statements, the clerk of the county court shall extend on such book all proper taxes at the same rate as assessed for the time on real estate, and he shall, on or before the first day of November thereafter, make out and deliver to the collector a copy of such book, properly certified, and take the receipt of the collector therefor, which receipt shall specify the aggregate amount of each kind of taxes due thereon, and the clerk shall charge the collector with the amount of such taxes; and such clerk shall receive as compensation for making such tax book, copy, filing statements, and certifying the same the sum of six cents for each name or firm, one-half payable by the county, and the other by the state, provided, that in counties of the first class and the city of St. Louis, any compensation provided for herein, received by the clerk of the county court, shall be paid into the county or city treasury, as provided by law."

Clearly, these provisions were in effect long prior to the enactment of Section 51.300, RSMo Supp. 1975, pertaining to the total compensation provisions of county clerks of the second, third and fourth class counties. See V.A.M.S. footnote to Section 150.070.

Subsection 4 of Section 51.300, provides:

> "The salary provided in this section shall be the total compensation received by the county clerk, except that he may retain any fees to which he is entitled for services performed in the issuance of fish and game licenses or permits. Any other fees received by him shall be deposited in the county treasury or as provided by law. His total annual salary, excluding the only allowable fees of fish and game licenses or permits above, shall be determined on or before January 1, 1971, and each year thereafter. The county population shall be based on the last federal decennial census, and the assessed valuation of the county shall be based upon the last available report of the state tax commission."

It appears obvious that even if Section 150.070 was intended to provide additional compensation for such county clerks the additional compensation would not be effective during the term of the present incumbents. This is because no new duties were placed on the office that had not already been merged into the general duties of the office at the time of the enactment of Section 51.300 and because Section 13 of Article VII of the Missouri Constitution prohibits an increase in an officer's salary during his term of office.

However, we are of the view that the reenactment of such provisions does not authorize an increase in such officer's compensation even after the present term of office. This is because the quoted provisions of Section 150.070, as reenacted in Senate Bill 277, were simply a verbatim reenactment of the identical provisions in the repealed section bearing the same number and as such are required to be construed as a continuation of such prior law and not as a new enactment. Section 1.120, RSMo. Inasmuch as the prior law had to be construed in the light of the provisions of Section 51.300, we do not view the amendment as authorizing an increase in the compensation of the county clerks.

Further, under subsection 4 of Section 51.300, fees received from the state under Section 150.070 must be deposited in the county treasury. Fees chargeable to the county would not be collected. Section 51.390, RSMo.

We note in passing, having answered your precise question, that a number of other questions have been raised with respect to the content of Senate Bill 277 because of language in the statute which is susceptible to a number of conflicting interpretations. We believe that the present question and other questions which we will not delineate here, should be given consideration by the legislature in the forthcoming session with a view toward clarifying legislative intent.

CONCLUSION

It is the opinion of this office that the reenactment of Section 150.070 in Senate Bill 277 of the First Regular Session of the 79th General Assembly, does not authorize the payment to the county clerk of any fees from the county provided for therein. Any fees received from the state by the clerk must be paid into the county treasury.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

November 29, 1977

OPINION LETTER NO. 216

Honorable Glenn H. Binger
State Representative, District 41
Route 3, R.D. Mize Road
Independence, Missouri 64050

Dear Representative Binger:

This letter is in response to your question asking:

> "Can a fire protection district created pursuant to Chapter 321 of R.S.Mo. in a class I county erect a fire station upon premises located outside of the corporate limits of the fire district to serve areas adjacent thereto located within the corporate limits of such fire district? Fire fighting equipment and personnel would be maintained at the fire station site adjacent but outside of the fire district."

You also state:

> "The Central Jackson County Fire Protection District was created pursuant to Chapter 321 and serves an area in Jackson County, including municipal limits of the City of Blue Springs and Lake Tapawingo. Some three to four years ago, by petition signed by residents of the area, additional area was annexed to the fire

> district located South of the City of Grain Valley, Missouri. This area annexed is primarily rural and is some distance from existing fire stations. The fire district Board of Directors proposes to erect a fire station to serve this rural area. However, due to road network and availability of utilities, the Board of Directors of the Fire District wish to locate their fire station within the corporate limits of the City of Grain Valley, which is not within the corporate limits of the fire district."

The powers and duties of a fire protection district of a first class county are set out in Section 321.600, RSMo 1969.

Such section provides in pertinent part:

> "For the purpose of providing fire protection to the property within the district, the district, and on its behalf the board, shall have the following powers, authority and privileges:
>
> * * *
>
> (6) To acquire, construct, purchase, maintain, dispose of and encumber real and personal property, fire stations, fire protection and fire fighting apparatus and auxiliary equipment therefor, and any interest therein, including leases and easements;"

It is stated in McQuillin, 3rd Ed., Municipal Corporations § 28.05, that the rule supported by the weight of authority as well as by the better reasoning is that a municipal corporation, where not prohibited, may purchase real estate outside its corporate limits for legitimate municipal purposes especially under a broad statutory or charter provision conferring power to purchase and hold real estate sufficient for public use, convenience or necessities.

We know of no provision prohibiting such a fire protection district from locating a fire station outside of the territory

which it serves. We believe that such a location would be proper if it is reasonably necessary to a proper exercise of the express powers of the fire protection district.

Very truly yours,

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

December 28, 1977

OPINION LETTER NO. 217

Honorable Russell G. Brockfeld
State Representative, District 108
Room 204, State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Brockfeld:

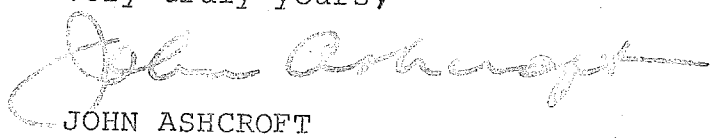
This letter is written in response to your request for an opinion as to the scope of House Committee Substitute for Senate Bill No. 214, enacted by the 79th General Assembly. Specifically, you ask whether the provisions of Senate Bill No. 214 are limited in application to certain blighted areas in urban regions, or whether the bill is applicable to every county in the state.

Senate Bill No. 214 of the 79th General Assembly prohibits a county assessor from adding to the assessed value of a dwelling of four or fewer residental units the additional assessed value because of "deferred maintenance" as such term is defined in the bill for a period of five years after a "deferred maintenance activity" has begun. In Section 3 of Senate Bill No. 214, the legislature makes it clear that the purpose for such a law is to provide a means for the renovation of obsolete properties as authorized by Section 7 of Article X of the Missouri Constitution. That section allows the General Assembly to provide some relief from taxation in order to encourage the reconstruction, redevelopment, and rehabilitation of obsolete, decadent or blighted areas.

Section 3 of Senate Bill No. 214 also indicates that the provisions of the act are to be applied by the assessor when making assessments of real property as required by the provisions of Section 137.115, RSMo Supp. 1975. Section 137.115 sets forth

the time and manner of assessment of real and tangible personal property by assessors in all counties of this state including the City of St. Louis. There is no other language in the act limiting its application to blighted areas in urban regions only. Accordingly, it is our opinion that the provisions of Senate Bill No. 214, enacted by the 79th General Assembly, apply to every county in the state under the conditions set forth therein.

Very truly yours,



JOHN ASHCROFT
Attorney General

COMPENSATION:
COUNTY CLERKS:

Under the provisions of SSHB 101, First Regular Session, 79th General Assembly, effective January 1, 1978, the county clerks in each county not having a board of election commissioners are entitled to receive the additional compensation provided for in Section 2.023 of the act to be determined as of January 1, 1978, and each year thereafter.

OPINION NO. 219

December 30, 1977

FILED
219

Honorable J. H. Frappier
State Senator, 2nd District
625 Glenco
St. Charles, Missouri 63301

Dear Seantor Frappier:

This opinion is in response to your question asking:

> "Does Senate Substitute for House Bill 101 of the 1st Regular Session, 79th General Assembly, provide for additional compensation for county clerks as of the effective date of the bill, i.e. January 1, 1978? If the legislation does not provide for additional compensation effective January 1, 1978, what is the effective date of Section 2.023?"

You also state that:

> "Sec. 1.020 provides an effective date of January 1, 1978.
>
> "Sec. 2.001 designates the county clerk to be the 'election authority' in counties without a board of election commissioners.
>
> "Sec. 2.020 requires that all elections, exceptions noted, shall be conducted by the election authority. The effective date for carrying out the provisions of this section is January 1, 1978.
>
> "Sec. 2.023 provides additional compensation for the county clerk for carrying out the duties of Sec. 2.020. Compensation is to be paid in <u>equal</u> <u>monthly</u> installments out of the county treasury.

> "Subsection 4. of Sec. 2.023 states, in part, 'The total annual amount (of the county clerks additional compensation) shall be determined on or before January 1, 1979 and each year thereafter.
>
> "Because of the language in subsection 4. of Section 2.023, there is some ambiguity as to the effective date of the election authority's (county clerk) additional compensation."

As you indicate Section 1.020 of SSHB 101 provides:

> "The effective date of this act shall be January 1, 1978. Any amendment made to a provision repealed by this act shall remain in force only until this act becomes effective."

Section 1.020 of SSHB 101 as originally introduced provided that the effective date of the act would be January 1, 1979. The other provisions of that section as introduced remained the same in final passage.

Subsection 1 of Section 2.023 of the act provides:

> "For the performance of additional duties imposed by section 2.020, the county clerk in each county which does not have a board of election commissioners shall receive an annual amount, which shall be equal to the sum of two variable amounts, one based upon the population of the county and the other upon the assessed valuation of the county and shall be payable in equal monthly installments out of the county treasury."

Subsection 2 of Section 2.023 of the act sets out the amounts to be received by such county clerks based upon population, and subsection of Section 2.023 sets out the amount to be received by such county clerks based upon assessed valuation.

Subsection 4 of Section 2.023 provides:

> "The total amount shall be determined on or before January 1, 1979 and each year thereafter. The county population shall be based on the last federal decennial census, and the assessed valuation of the county shall be based on the last available report of the state tax commission."

Our comparison of the above provisions of Section 2.023 in SSHB 101, as truly agreed to and finally passed, indicates that the provisions are identical with the provisions as originally introduced except for the amounts to be paid based upon population and assessed valuation. The amounts to be paid to such clerks were changed during the course of passage.

We will not quote Section 2.020 here because of its length. However, we do point out that such section provides for additional duties to be performed by such clerks. Therefore, the allowance to such clerks of additional compensation for the performance of such duties would not be in violation of Section 13 of Article VII of the Missouri Constitution which prohibits an increase in an officer's compensation during his term of office. That is, the only obvious reason for the retention of the date of January 1, 1979, in the truly agreed to and finally passed version of the bill, despite the change in the effective date of the law, would be on the possible basis that such an increase was objectionable under Section 13 of Article VII of the Constitution as an increase in the officer's compensation during the term of office. Since we have ruled out such a constitutional objection as a possible motivation for retaining the January 1, 1979 date and in view of the fact that the express language of Section 2.023 indicates that the legislature viewed such duties as additional duties, we are left with the consideration of the conflict which exists because of the provisions of subsection 1 of Section 2.023 and the provisions of subsection 4 of Section 2.023.

Clearly where the language of a statute is not ambiguous the court will not construe the law and will be guided by what the legislature says and not by what the court may think the legislature meant to say. The Missouri Public Service Co. v. Platte-Clay Elec. Coop., Inc., 407 S.W.2d 883 (Mo 1966); DePoortere v. Commercial Credit Corp., 500 S.W.2d 724 (Mo.Ct.App. at Spr. 1973).

On the other hand when there is an ambiguity in statutory provisions the court will construe such provisions in accordance with the legislative intent. The court in order to give effect to the manifest purpose of the legislature may reject words and figures when necessary. State ex rel. Consolidated School Dist. No. 1 v. Hackmann, 258 S.W. 1011 (Mo. Banc 1924). Thus, the letter of a statute may be enlarged or restrained according to the true intent of the framers of the law. Stack v. General Baking Co., 223 S.W. 89 (Mo. 1920). See V.A.M.S., Construction of Statutes, §1.020 Notes 49-50.

We believe that these provisions read together indicate an ambiguity with respect to legislative intent which permits the application of the principles of construction to determine such intent.

As we have noted, the act as finally passed provided that such county clerks would receive the amounts set out according to population and assessed valuation for the additional duties imposed on them by Section 2.020. The clerks obviously must perform these additional duties after such act becomes effective.

We conclude that it was the legislative intent that such county clerks receive compensation for the additional duties imposed upon them beginning on the effective date of the act, January 1, 1978. It is obvious that the legislature inadvertently neglected to change the date contained in subsection 4 to January 1, 1978, which should have been done in order to be consistent with the change in the effective date of the law. The provisions of subsection 4 should not be taken to indicate a legislative intent contrary to that evidenced by subsection 1 of the same section.

We therefore conclude that commencing upon the effective date of SSHB 101 such county clerks will be entitled to the additional compensation provided by Section 2.023 of that law.

CONCLUSION

It is the opinion of this office that under the provisions of SSHB 101, First Regular Session, 79th General Assembly, effective January 1, 1978, the county clerks in each county not having a board of election commissioners are entitled to receive the additional compensation provided for in Section 2.023 of that act to be determined as of January 1, 1978, and each year thereafter.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

December 27, 1977

OPINION LETTER NO. 221
Answer by letter-Wieler

Mr. Stephen C. Bradford, Commissioner
Office of Administration
P. O. Box 809
Jefferson City, Missouri 65101

Dear Mr. Bradford:

This letter is being issued in response to your request for an opinion as to the responsible agency for the custodianship of cancelled revenue bonds and coupons issued by the Board of Public Buildings and State Park Board pursuant to Chapters 8 and 253 of the Revised Statutes of Missouri.

In your request, you indicate that each authorizing agency is currently keeping the cancelled bonds and coupons in various states of order, or organization and completeness. It was suggested that a more businesslike procedure would be to have the Board of Fund Commissioners take possession of the cancelled revenue bonds and coupons in the same manner as they do general obligation bonds of the state.

As set forth in Sections 33.300 to 33.540, RSMo, as amended by House Bill 178, First Regular Session, 79th General Assembly, the Board of Fund Commissioners has certain authorized responsibilities with respect to bonds of the State of Missouri. Among these are the provisions of Section 33.530, RSMo, as amended, which requires the State Treasurer to keep all cancelled bonds and coupons in proper order.

However, it is important to note that the duties of the State Treasurer, as well as the other members of the Board of Fund Commissioners, are limited by Section 33.300, RSMo, as amended, which only requires them to deal with bonds of the state.

The bonds in question are not bonds of the State of Missouri, but rather revenue bonds payable out of the net income and revenues derived from projects authorized by the Board of Public Buildings and the State Park Board pursuant to law. Sections 8.370 to 8.460, RSMo, as amended, allow the Board of Public Buildings to issue revenue bonds for the purpose of providing funds for the construction or acquisition of certain designated projects. Section 8.410, RSMo, specifically provides that such bonds shall not be deemed to be an indebtedness of the State of Missouri or of the Board, or the individual members of the Board. Sections 253.210 to 253.280, RSMo, as amended, authorize the State Park Board to issue revenue bonds for the purpose of providing funds for the construction or acquisition of certain projects as provided by law. Section 253.250, RSMo, specifically provides that such bonds are not an indebtedness of the State of Missouri, or of the State Park Board or of the individual members thereof.

Inasmuch as such bonds are not an indebtedness of the State, the Board of Fund Commissioners cannot be compelled to take physical possession of the cancelled revenue bonds and coupons issued by the Board of Public Buildings and the State Park Board in the same manner as general obligation bonds of the State of Missouri. Rather, the agencies responsible for issuing such revenue bonds must maintain custodianship of the cancelled bonds and coupons.

Very truly yours,

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

December 30, 1977

OPINION LETTER NO. 222

Honorable Thomas M. Keyes
State Auditor
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Keyes:

This opinion is in response to your question asking whether the commission of a county collector of a third class county which is subject to the provisions of Section 52.120, RSMo, should include the commission provided for in Section 52.140, RSMo, in view of the later provisions of Section 52.270, RSMo Supp. 1975.

Section 52.140, RSMo, provides:

> "In all such counties where the collector of the revenue is required by section 52.120 to maintain a branch office as provided in section 52.120, he shall be allowed to retain, in addition to the amount now authorized by law, three-fourths of one percent of all taxes collected to cover the additional expense of maintaining such branch office."

It is our understanding that Marion County comes within the classification of subdivision (14) of Section 52.260, and, therefore, subsection 2 of Section 52.270 is applicable to the Marion County Collector.

Subsections 2 and 3 of Section 52.270, RSMo Supp. 1975, provide:

> "2. The collector of revenue in any county within the classification of subdivision (14) of section 52.260 shall present for allowance proper vouchers for all disbursements made by him on account of salaries and expenses of his office and other costs of collecting the revenue, which shall be allowed as against the commissions collected by him; and out of the residue of commissions in his hands after deducting the amounts so allowed, the collector may retain a compensation for his services at the rate of ten thousand dollars per year. If the residue of commissions is less than sufficient to pay the above compensation, the entire residue shall be allowed to him as full payment for his services. If the residue is more than sufficient to pay the compensation, the surplus shall be paid over to the state, school, county and city in the proportion which the amount collected from each bears to the total amount of collections.
>
> "3. The limitation on the amount to be retained as herein provided applies to fees and commissions on current taxes, but does not apply to commissions on the collection of back and delinquent taxes and ditch and levee taxes nor to fees provided by section 52.250."

Sections 52.120, 52.130, and 52.140, RSMo, were originally enacted in the Laws of 1915, p. 396. A comparison of the laws as originally enacted with those presently in force indicate that they are substantially similar.

Section 52.120, requires certain collectors to maintain branch offices in certain counties and Section 52.130 makes it the duty of such collectors to keep certain tax books in said branch office, and to keep one or more deputies in said office to tend the duties thereof.

It is our view that subsection 2 of Section 52.270 controls because it is later in date than Section 52.140 and its provisions comprehensively answer the question you ask.

Honorable Thomas M. Keyes

It is clear that the allowance under Section 52.140 is not within the exceptions contained in subsection 3 of Section 52.270.

Additionally we note that it is our view that Section 52.280, RSMo is not applicable to collectors coming within subsection 2 of Section 52.270. Subsections 2 and 3 of Section 52.270 were added by the Laws of 1961, p. 286, subsequent to the enactment of Section 52.280. Although Section 52.280 was amended in 1969, it was changed only as respects the percentage which could be retained for deputy and clerical hire.

We conclude that these statutes indicate a legislative intent that the allowance provided for under Section 52.140 would be subject to the provisions of subsection 2 of Section 52.270. Therefore, the allowance calculated pursuant to Section 52.140 must be included in the determination of the collector's maximum compensation made pursuant to subsection 2 of Section 52.270.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

MISSOURI STATE EMPLOYEES' RETIREMENT SYSTEM:
PENSIONS:
COMPREHENSIVE EMPLOYMENT AND TRAINING ACT:

1. An employer which is participating in the Missouri State Employees' Retirement System may not withhold from the Retirement System the employer's share of contributions for full-time employees whose salary and fringe benefits are funded through the Comprehensive Employment and Training Act of 1973 (CETA) until such time as the benefits for such employees vest. 2. The Missouri State Employees' Retirement System may not refund to an employer the employer's contributions attributable to any such employee who terminates his employment prior to the vesting of his benefits.

OPINION NO. 223

November 30, 1977

FILED
223

Mr. Edwin M. Bode
Executive Secretary
Missouri State Employees' Retirement System
900 Leslie Boulevard
Jefferson City, Missouri 65101

Dear Mr. Bode:

This is to acknowledge receipt of your request for a formal opinion from this office which reads as follows:

> "May any employer participating in the Missouri State Employees' Retirement System withhold from the Retirement System the employer's share of contributions for any full-time employee whose salary and fringe benefits may be funded through the Comprehensive Employment and Training Act of 1973 (CETA) until such time as the individual employee becomes vested?
>
> "If the answer to the preceding question is no, may the Missouri State Employees' Retirement System refund to the individual employer the employer's contributions attributable to any such employee who terminates his employment prior to vesting?"

First of all, it should be noted that this opinion is applicable only to those full-time employees whose salaries are funded through the Comprehensive Employment and Training Act of 1973 (CETA). In addition, by the term "fringe benefits" the assumption is made that you are referring to those employees who are participating in the Missouri State Medical Care Plan.

In connection with the above, it is our understanding that the U.S. Department of Labor has announced regulations in regard to the use of certain employer contributions to public pension plans which are paid from Comprehensive Employment and Training Act (CETA) funds. It is further our understanding that these regulations became effective on October 1, 1977, but that a prime sponsor or eligible applicant which is in a state whose law prevents the implementation of procedures required by Section 98.25 may request an extension. However, such extension may be granted only upon a showing by an opinion of the State Attorney General that: (1) the state legislature must change or modify a particular state law or laws so that prime sponsor or eligible applicant may comply with Section 98.25 in its use of CETA funds; (2) the procedures of Section 98.25 of the regulations may not be legally implemented by order of the Governor or by other executive authorities; and (3) the necessary changes and modifications cannot be completed by October 1, 1977.

With the above principles in mind, the statutes relating to the operation of the Missouri State Employees' Retirement System are found in Sections 104.310 through 104.550, of the Missouri Revised Statutes. In this regard, the terms "employee" and "employer" are defined in part in subsections (15) and (16) of Section 104.310, RSMo Supp. 1975, as follows:

> "(15) 'Employee', any elective or appointive officer or employee of the state who is employed by a department and earns a salary or wage in a position normally requiring the actual performance by him of duties during not less than one thousand five hundred hours per year, . . .
>
> "(16) 'Employer', a department;"

In addition to the above, the term "department" is defined in subsection (11) of Section 104.310, as follows:

> "'Department', any department, institution, board, commission, officer, court or any agency of the state government receiving state appropriations including allocated funds from the federal government and having power to certify payrolls authorizing payments of salary or wages against appropriations made by the federal government or the state legislature from any state fund, or against trusts or allocated funds held by the state treasurer;"

It should also be noted that under the provisions of subsection (1) of Section 104.372, RSMo Supp. 1975, no payroll deduction is made from the compensation of any employee for the Missouri State Employees' Retirement Fund after August 31, 1972, with certain exceptions that are not applicable. Similarly, under the provisions of subsection (1) of Section 104.370, RSMo Supp. 1975, the Board of Trustees of the Missouri State Employees' Retirement System certifies to the Division of Budget an actuarially determined estimate of the amount which will be necessary during the next biennial or appropriation period to pay all liabilities including costs of administration which shall exist or accrue under Sections 104.310 to 104.550 during such period. Subsequently, the Commissioner of Administration requests appropriation of the amount calculated under the provisions of subsection (1), and thereafter the Commissioner of Administration monthly certifies the payment to the Secretary of the Missouri State Employees' Retirement System. Lastly, under the provisions of subsection (5) of Section 104.515, RSMo Supp. 1975, commencing on September 1, 1976, the state of Missouri contributes twelve dollars per month per employee who is a member of the Missouri State Employees' Retirement System to the Missouri State Medical Care Plan, whether or not that employee actually participates in the Missouri State Medical Care Plan.

In connection with the above, it is our understanding that the state of Missouri and various agencies participate in the Comprehensive Employment and Training Act program which is administered by the Office of Manpower Planning in the Department of Social Services. The Office of Manpower Planning in turn subcontracts the operation of this program to the Division of Employment Security. It is further our understanding that when U.S. Treasury checks are received from the Regional Office, U.S. Department of Labor, Kansas City, Missouri, as grants under the Comprehensive Employment and Training Act program, these funds are deposited to the Unemployment Compensation Administation Fund in the State Treasury. Subsequently, payrolls are received in the office of Division of Employment Security from each state agency participating in the program. These payrolls are then consolidated into one payroll by that office and forwarded to the State Comptroller for payment. Thereafter the Unemployment Compensation Administration

Fund is then charged with the payroll costs along with the employer's share of social security, state retirement costs, and Missouri State Medical Care Plan costs.

Upon review of the foregoing statutory provisions and the operation of the Comprehensive Employment and Training Act program, it is first of all our view that employees who are working under the provisions of the Comprehensive Employment and Training Act program are eligible to participate in the Missouri State Employees' Retirement System. For a similar interpretation, see attached Attorney General's Opinion No. 3, 10-7-57, Atterbury and Opinion Letter No. 191, 6-23-72, Bode. Under such circumstances, it is further our view that these particular employees are required to participate in the Missouri State Employees' Retirement System and that the individual employer may not withhold from the Retirement System or the Missouri State Medical care Plan the employer's share of contributions or medical care payments for full-time employees whose salaries and fringe benefits are funded through the Comprehensive Employment and Training Act of 1973 (CETA). In so holding, we need not and do not resolve the question of whether or not retirement benefits as to this Retirement System are gratuities or deferred compensation. See Police Retirement System of Kansas City v. City of Kansas City, Missouri, 529 S.W.2d 388 (Mo. 1975). Further, we are of the view that the procedures of Section 98.25 of the regulations may not be legally implemented by an order of the Governor, the reason being that an executive order is not a "law." See State ex rel. McKittrick v. Missouri Public Service Commission, 175 S.W.2d 857, 861 (Mo. Banc 1943).

In response to your second question, the statutory provisions relating to employer's contributions are found in Section 104.370. In reviewing these statutory provisions, we find no authority for the Missouri State Employees' Retirement System to refund to an employer the employer's contributions attributable to any employee who terminates his employment prior to the vesting of his benefits.

CONCLUSION

It is the opinion of this office that:

1. An employer which is participating in the Missouri State Employees' Retirement System may not withhold from the Retirement System the employer's share of contributions for full-time employees whose salary and fringe benefits are funded through the Comprehensive Employment and Training Act of 1973 (CETA) until such time as the benefits for such employees vest.

2. The Missouri State Employees Retirement System may not refund to an employer the employer's contributions attributable to any such employee who terminates his employment prior to the vesting of his benefits.

The foregoing opinion, which I hereby approve, was prepared by my assistant, B. J. Jones.

Yours very truly,

John Ashcroft

JOHN ASHCROFT
Attorney General

Enclosures: Op. No. 3
Atterberry, 10-7-57

Op. Ltr. No. 191
Bode, 6-23-72

NON-TEACHER SCHOOL EMPLOYEES' RETIREMENT SYSTEM:
COMPREHENSIVE EMPLOYMENT AND TRAINING ACT:
PENSIONS:

1. An employer who is participating in the Non-Teacher School Employees' Retirement System of Missouri may not withhold from the Retirement System the employer's share of contributions for full-time employees whose salaries are funded through the Comprehensive Employment and Training Act of 1973. 2. The Non-Teacher School Employees' Retirement System of Missouri may not refund to an employer the employer's contributions attributable to any such employee who terminates his employment prior to the vesting of his benefits.

OPINION NO. 224

November 30, 1977

FILED
224

Mr. Warren M. Black
Executive Secretary
Public School Retirement System
of Missouri
Post Office Box 268
Jefferson City, Missouri 65101

Dear Mr. Black:

This is to acknowledge receipt of your request for an opinion from this office which reads as follows:

> "May an employer who is participating in the Non-Teacher School Employees' Retirement System of Missouri withhold from the Retirement System the employer's share of contributions for any full-time employee whose salary may be funded through the Comprehensive Employment and Training Act of 1973 (CETA) until such time as the employee becomes a vested member?
>
> "If the answer to the preceding question is no, may the Retirement System refund to the participating employer the employer's contributions attributable to any such employee who terminates his employment prior to the time the employee would become a vested member."

First of all, it should be noted that this opinion is applicable only to those full-time employees whose salaries are funded through the Comprehensive Employment and Training Act of 1973 (CETA).

In connection with the above, it is our understanding that the U.S. Department of Labor has announced regulations in regard to the use of certain employer contributions to public pension plans which are paid from Comprehensive Employment and Training Act (CETA) funds. It is further our understanding that these regulations became effective on October 1, 1977, but that a prime sponsor or eligible applicant which is in a state whose law prevents the implementation of procedures required by Section 98.25 of the regulations may request an extension. However, such extension may be granted only upon a showing by an opinion of the state attorney general that: (1) the state legislature must change or modify a particular state law or laws so that the prime sponsor or eligible applicant may comply with Section 98.25 of the regulations in its use of CETA funds; (2) the procedures of Section 98.25 of the regulations may not be legally implemented by order of the governor or by other executive authorities; (3) the necessary changes and modifications cannot be concluded by October 1, 1977.

With the above principles in mind, the statutes relating to the operation of the Non-Teacher School Employees' Retirement System of Missouri are found in Sections 169.600 through 169.670, of the Missouri Revised Statutes. In this regard, the terms "employee" and "employer" are defined in part in subsections (4) and (5) of Section 169.600, RSMo Supp. 1975, as follows:

> "(4) 'Employee', any person regularly employed by a public school district, junior college district or by the board of trustees, as defined in sections 169.600 to 169.710, who devotes at least twenty hours per week to such employment in a position which is not covered by the public school retirement system of Missouri; provided, however, that no person shall be entitled to, or required to contribute to, or to receive benefits under, both the retirement system herein established and the public school retirement system of Missouri for the same services;
>
> "(5) 'Employer', the district or other employer that makes payment directly to the employee for his services;"

In addition to the above, subsection 1 of Section 169.620, RSMo Supp. 1975, provides in part that the funds required for the operation of the Retirement System created by Sections 169.600 to 169.710 shall come from contributions made in equal amounts by employees and their employers. Subsection 2 of Section 169.620, RSMo Supp. 1975, provides that every employer of one or more persons who are members of the system shall transmit to the board of trustees before the end of such school year, twice the amount that is deductible from the pay of such employee or employees during the school year. Failure or refusal to transmit such amount as required shall render the person or persons responsible, therefore, individually liable for twice the amount so withheld. Criminal penalties may also be applicable. Lastly, subsection 5 of Section 169.620, RSMo Supp. 1975, provides that regardless of the provisions of any law governing compensation and contracts, every employee shall be deemed to consent and agree to the deductions provided therein.

As a result of the above statutory conclusions, we conclude that if an employer is participating in the Non-Teacher School Employees' Retirement System of Missouri then the individual employee of said employer, if otherwise eligible, is required to participate in the Non-Teacher Employees' Retirement System of Missouri and the employer may not withhold from the Retirement System the employer's share of contributions for full-time employees whose salaries are funded through the Comprehensive Employment and Training Act of 1973 (CETA). In so holding, we need not and do not resolve the question of whether or not retirement benefits as to this Retirement System are gratuities or deferred compensation. See Police Retirement System of Kansas City, Missouri v. City of Kansas City, Missouri, 529 S.W.2d 388 (Mo. 1975). Further, we are of the view that the procedures of Section 98.25 of the regulations may not be legally implemented by an order of the governor, the reason being that an executive order is not a "law". See State ex rel. McKittrick v. Missouri Public Service Commission, 175 S.W.2d 857, 861 (Mo.Banc 1943).

In response to your second question, the statutory provisions relating to employer's contributions as previously referred to, are found in Section 169.620, RSMo Supp. 1975. In reviewing these statutory provisions, we find no authority for the Non-Teacher School Employees' Retirement System of Missouri to refund to an employer the employer's contributions attributable to any employee who terminates his employment prior to the vesting of his benefits.

CONCLUSION

It is the opinion of this office that:

1. An employer who is participating in the Non-Teacher School Employees' Retirement System of Missouri may not withhold from the Retirement System the employer's share of contributions for full-time employees whose salaries are funded through the Comprehensive Employment and Training Act of 1973.

2. The Non-Teacher School Employees' Retirement System of Missouri may not refund to an employer the employer's contributions attributable to any such employee who terminates his employment prior to the vesting of his benefits.

The foregoing opinion, which I hereby approve, was prepared by my assistant, B. J. Jones.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

GOVERNOR:
OFFICERS:
STATE OFFICERS:
CONSTITUTIONAL LAW:

The Governor has authority to "withdraw" the appointment of a person made during a Senate recess before the Senate rejects the appointment or fails to approve the appointment within thirty days after the Senate has convened only if the "withdrawal" is made by removal of the appointee pursuant to Section 17 of Article IV of the Missouri Constitution. The Governor has authority to withdraw the nomination of a person made during a session of the Senate before the Senate rejects the nomination or fails to act on the nomination during such session. If, prior to withdrawal or removal, the Senate rejects either such nomination or appointment or fails to act thereon as required the appointee or nominee cannot again be reappointed or renominated to the same position. A person appointed during a recess of the Senate may resign pursuant to Section 12 of Article VII of the Constitution without prejudice and can be reappointed. A person nominated during a session may withdraw his name from consideration by the Senate without prejudice and can be reappointed.

OPINION NO. 226

November 22, 1977

FILED
226

Honorable Richard M. Webster
Missouri Senate, 32nd District
Room 434, State Capitol Building
Jefferson City, Missouri 65101

Dear Senator Webster:

This opinion is in response to your question asking for an interpretation of the provisions of Section 51, Article IV of the Missouri Constitution.

In our opinion No. 203-1977 to Senator Banks, copy enclosed, this office answered several questions concerning such section. The enclosed opinion is self-explanatory and we will not repeat it here. Likewise, for the sake of brevity we will not repeat the context of Section 51, Article IV which is set forth in such opinion, or the cases referred to therein.

Your first questions asks:

> "A name may be submitted by the governor either while we are in session or while we are not in session. Before the gubernatorial appointments committee, or the senate, has acted the name is withdrawn by the governor.

> "Question: Is a person whose name has been submitted to the senate, withdrawn by the governor before action, and not acted upon by the senate entitled to be reappointed to the same position?"

As we indicated in our opinion No. 203-1977, the answer will be different depending upon whether or not the appointment is made during a session or during a recess of the Senate. If the appointment is made during a recess, the appointment is an appointment in the true sense of the term and needs only Senate approval. The recess appointee takes office until the appointment is disapproved by the Senate or the Senate fails to act upon such appointment within the thirty day constitutional limitation. See also Opinion No. 182-1977 to Merrell, copy enclosed.

If the Senate is in session when such appointment is made, the appointment is a mere nomination and the appointee or nominee does not take office until he is approved by the Senate and duly qualifies. During the time a nomination, which is made during a session of the Senate, is pending approval, the incumbent, assuming there is one, holds over in office under the provisions of Section 12 of Article VII of the Missouri Constitution.

Unless the Governor lawfully removes a person after appointing him during a recess, the last official act of the Governor occurs when the Governor appoints the person during a recess and such person takes office. An attempted withdrawal by the Governor at that point of a person who was appointed while the Senate was in recess, would be tantamount to removal by the Governor. It is our view that the Governor does not have the authority to remove a person who has been so appointed and is acting, unless the Governor's removal power is exercised pursuant to Section 17 of Article IV. Depending upon the nature of the office involved, the Governor may have the power of removal of an incumbent under Section 17 of Article IV of the MIssouri Constitution which provides that all appointed officers may be removed by the Governor. Therefore, our answer to your question with respect to removals depends upon the actual facts involved. A person appointed during a recess who is validly removed by the Governor before Senate rejection or before the Senate fails to give its approval within the thirty day limitation may be reappointed by the Governor to the same position. In cases where the person cannot be removed by the Governor under provisions of Section 17 of Article IV, the person's appointment must be confirmed by the Senate within the thirty day limit as provided in Section 51 of Article IV of the Constitution or he no longer holds such office.

On the other hand, where the nomination is made while the Senate is in session, the nominee has not taken office and it is our view that the nomination may be withdrawn by the Governor before the Senate takes any action. It is also our view that if the nomination which is submitted to the Senate during a session of the Senate is withdrawn by the Governor before the end of the session or before rejection by the Senate, the nominee is entitled to be again nominated to the same position.

Your second question asks:

> "A name is submitted by the governor either while we are in session or not in session, the senate takes no action on the appointment and returns the appointment to the governor without having approved or disapproved the appointment.
>
> "Question: Can such a person be reappointed to the same position by the governor?"

As we noted in our Opinion No. 182-1977, an appointment made while the Senate is not in session requires approval by the Senate within thirty days after the Senate convenes in regular or special session. If such approval is not obtained within such time under the provisions of Section 51 of Article IV of the Constitution, such appointment fails and such person cannot be reappointed by the Governor to the same position.

If the appointment or nomination is made while the Senate is in session but fails to receive the advice and consent of the Senate, the person so nominated cannot be reappointed by the Governor to the same office or position.

Your third question asks:

> "A name is submitted by the governor, either while we were in session or not in session. Before the senate can take action the appointee resigns from the position.
>
> "Question: Can such a person be reappointed by the governor?"

If the person is already in office because he was appointed during a recess of the Senate, such person still has the right to resign his office under Section 12 of Article VII of the Constitution. It is our view that such an appointee has the right to resign his position before the Senate rejects the appointment or fails to approve the appointment within the thirty days in which the advice and consent of the Senate must be given under Section 51 of Article IV of the Constitution without prejudice to his right to be reappointed or renominated by the governor to the same position subject to the advice and consent of the Senate at another time, either during a recess of the Senate, or while the Senate is in session.

We believe that the same is true of a person who is nominated while the Senate is in session. Although such person would not actually be in office and therefore would not be resigning within

the meaning of Section 12 of Article VII of the Constitution, we are of the view that such a person could withdraw himself from consideration by the Senate before the Senate rejects the appointment or fails to approve the appointment prior to the end of the session without prejudice to his right to be reappointed or renominated at some other time during a recess of the Senate or during a session of the Senate.

Finally, we point out that our answer to your questions are not based upon any particular fact situation. Although we have attempted to ascertain the intent of the voters in adopting Section 51 of Article IV, and to apply the applicable principles of law, we do not believe that we can say with certainty how a court would rule when presented with a live controversy. Therefore, although we submit our views to you, we reserve the right to make a determination of specific controversies if such specific controversies become a proper subject for action by this office.

We do not attempt to pass upon the effect of statutory provisions for the removal of officers.

CONCLUSION

It is the opinion of this office with respect to the provisions of Section 51 of Article IV of the Missouri Constitution that: The Governor has authority to "withdraw" the appointment of a person made during a Senate recess before the Senate rejects the appointment or fails to approve the appointment within thirty days after the Senate has convened only if the "withdrawal" is made by removal of the appointee pursuant to Section 17 of Article IV of the Missouri Constitution. The Governor has authority to withdraw the nomination of a person made during a session of the Senate before the Senate rejects the nomination or fails to act on the nomination during such session. If, prior to withdrawal or removal, the Senate rejects either such nomination or appointment or fails to act thereon as required the appointee or nominee cannot again be reappointed or renominated to the same position. A person appointed during a recess of the Senate may resign pursuant to Section 12 of Article VII of the Constitution without prejudice and can be reappointed. A person nominated during a session may withdraw his name from consideration by the Senate without prejudice and can be reappointed.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,

John Ashcroft

JOHN ASHCROFT
Attorney General

Enclosures: Op. No. 203-1977
Op. No. 182-1977

ELECTIONS:
WATER DISTRICTS;
AMBULANCE DISTRICTS:

Senate Substitute for House Bill 101 of the First Regular Session, 79th General Assembly, effective January 1, 1978, repeals by implication contrary provisions of Section 247.180, RSMo Supp. 1976, relating to water district elections and of Section 190.055, RSMo Supp. 1975, relating to ambulance district elections.

OPINION NO. 228

November 14, 1977

FILED
228

Honorable Lowell McCuskey
Prosecuting Attorney
Osage County
Post Office Box L
Linn, Missouri 65051

Dear Mr. McCuskey:

This letter is in response to your request for an opinion of this office asking essentially whether Section 247.180, RSMo Supp. 1976 and Section 190.055, RSMo Supp. 1975, relating respectively to elections in water districts and elections in ambulance districts are still applicable in view of the enactment of Senate Substitute for House Bill 101 of the First Regular Session, 79th General Assembly (hereinafter referred to as House Bill 101). The same request regarding water district elections has been submitted to us by the Honorable Roy L. Richter, Prosecuting Attorney of Montgomery County, and the Honorable C. E. Hamilton, Prosecuting Attorney of Callaway County. We are answering all three requests by this opinion.

House Bill 101 contains an effective date of January 1, 1978. Section 1.020.

Section 1.001 of the act provides that the act shall be known as the Comprehensive Election Act of 1977.

Section 1.005 of the act provides that the purpose of the act is to simplify, clarify and harmonize the laws governing elections. It also provides that it shall be construed and applied so as to accomplish its purpose.

Section 1.010 of the act provides that notwithstanding any other provision of law to the contrary, this act shall apply to all public elections in the state.

Section 1.015 of the act provides that no part of this act shall be construed as impliedly amended or repealed by subsequent legislation if such construction can be reasonably avoided.

Subsection 24 of Section 1.025 of the act contains the definition of "special district" and provides that the term means ". . . any school district, water district, fire protection district or other district formed under the laws of Missouri to provide limited, specific services; . . ."

Both of the sections to which you refer were enacted prior to House Bill 101. On the other hand, both sections are clearly specific and relate to specific subjects. Further, it is clear from an examination of House Bill 101 that neither of the sections about which you inquire were expressly repealed and therefore the simple question that remains is whether or not there is a necessary repeal by implication of such sections because of the provisions of House Bill 101.

We note from an examination of House Bill 101 that it was originally introduced containing the effective date of January 1, 1979. It is our understanding that such effective date would have given the legislature ample time to harmonize other provisions of the law, such as the ones in question, with the provisions of that bill. However, in final passage the effective date of the law was moved back one year, as we indicated, to January 1, 1978.

Several basic principles of statutory construction are involved. First, we must ascertain legislative intent. In determining such legislative intent the court should ascribe to the statutory language its plain and rational meaning. Gas Service Company v. Morris, 353 S.W.2d 645 (Mo. 1962). Thus, as far as the legislative intent is concerned, it is clear that the legislature intended that House Bill 101 be a comprehensive election law applying to all public elections in the state, including special district elections as defined therein.

The second basic principle of statutory construction is that special statutes usually prevail over general statutes even though the general statute is later in point of time. See V.A.M.S., Construction of Statutes, § 1.020, Note 95. A typical case

supporting such holding is State ex rel. Monier v. Crawford, 262 S.W. 341 (Mo.Banc 1924). There is also authority for the proposition that where the general act is later the special statutes will be construed as remaining an exception to its terms unless it is repealed in express words or by necessary implication. Dalton v. Fabius River Drainage Dist., 219 S.W.2d 289 (St.L.Ct.App. 1949). However, the court in the absence of compelling authority to the contrary will avoid a construction of a statute which would run counter to the plain and consistent legislative intent. State on Inf. Taylor v. Kiburz, 208 S.W.2d 285 (Mo.Banc 1948). Further, the primary purpose of interpretation of a statute is to reach the true legislative intent. State ex rel. Brokaw v. Board of Education of City of St. Louis, 171 S.W.2d 75 (St.L.Ct.App. 1943). Thus, it seems clear that where the legislative intent is obvious it will control, and under such a construction, House Bill 101 would have to be given its clear meaning unless it is constitutionally objectionable.

In State ex rel. McNary v. Stussie, 518 S.W.2d 630 (Mo.Banc 1974), the court considered the constitutionality of Senate Bill 438, adopted by the 77th General Assembly, which allegedly reduced the minimum age of jurors to age eighteen. The context of Senate Bill 438 is set out in that case and we will not repeat it here. In its opinion the court considered the holding of State ex rel. Maguire v. Draper, 47 Mo. 29 (1870) and stated, l.c. 635:

> "In Maguire the question presented involved the validity and legal effect of a statute adopted in 1870 with reference to assessment and collection of revenue. It did not purport to amend any existing act or section thereof and made no reference thereto. Instead, it purported to be an act complete within itself. However, it was repugnant to and inconsistent with portions of a previously enacted revenue act. The court overruled a contention that the 1870 act violated Art. IV, § 25 of the 1865 Constitution, saying l.c. 32:
>
> > '* * * The statute under consideration, however, does not purport in terms to amend or repeal any particular act or section, and can only be held to have that effect by implication.
> >
> > '* * * The Constitution has gone so far as to prohibit amendments in terms, except

> in a particular way, but it has not prohibited amendments by implication. It has not said that when an act is passed inconsistent with a preceding one, so that both cannot stand, the latter one shall be void and the earlier one shall prevail, but has left the law as it always has been, viz: that when two statutes are inconsistent and repugnant, the one last enacted shall be considered in force.'

"The doctrine applied in Maguire simply recognizes that occasions do occur in which some repugnance or inconsistency exists between two statutes adopted by the legislature. In such a situation, the court will attempt to reconcile them and apply both, but if this is not possible and both cannot stand, the later act will be held to have repealed by implication the earlier of the two acts, thereby giving effect to the most recently expressed legislative intent of the General Assembly. However, the doctrine applies only when the two inconsistent statutes each purport to be complete and independent legislation. 82 C.J.S. Statutes § 262a, p. 432. Furthermore, repeal by implication is not favored. State ex rel. George B. Peck Co. v. Brown, 34 Mo. 1189, 105 S.W.2d 909 (1937); Vol. I, Cooley's Constitutional Limitations (8th ed.), p. 316.

"The Maguire case and the doctrine of repeal or amendment by implication are not pertinent to the issue of the constitutionality of what § 3 of Act 70 [the court referring to Vernon's Missouri Legislative Service, 1974, which set forth Senate Bill 438] undertakes to do. Act 70 is not a completely new statute with reference to jurors, which is repugnant to the previously existing statute on the subject. Instead, without even specifically referring to the juror statute (or, for that matter, others to which Act 70 might be considered to be applicable), Act 70 undertakes on a blanket or shotgun basis to strike

> out of all statutes (except as provided in §§ 2 and 4 of Act 70) the words 'twenty-one years of age' and to substitute therefor the words 'eighteen years of age'. The statutes uses the phrase 'shall be deemed to mean' but it is clear that a substitution of terms is intended and this is confirmed by the direction given to the revisor of statutes."

Thus, the court in State ex rel. McNary v. Stussie, supra, concluded that the provisions there in question violated Section 28 of Article III of the Constitution which provides in part as follows:

> ". . . No act shall be amended by providing that words be stricken out or inserted, but the words to be stricken out, or the words to be inserted, or the words to be stricken out and those inserted in lieu thereof, together with the act or a section amended, shall be set forth in full as amended."

It is also a basic rule of construction that the courts must be reluctant to declare statutes unconstitutional and must resolve all doubts in favor of the validity of a legislative act. State ex rel. McClellan v. Godfrey, 519 S.W.2d 4 (Mo.Banc 1975).

The question then is whether or not, from a constitutional standpoint, House Bill 101 has the constitutional invalidity found to exist in, State ex rel. McNary v. Stussie, supra, or whether it comes within the terms of State ex rel. Maguire v. Draper, supra. We view House Bill 101 as a complete act in itself relating to elections and, as we noted, it specifically includes special districts.

It was stated in State ex rel. Maguire v. Draper, supra, that the Constitution does not prohibit repeals by implication and that when two statutes are inconsistent and repugnant the last one enacted shall be considered in force. The court stated, l.c. 32-33:

> ". . . This must be so in the nature of things, for the last enactment is the latest expression of the Legislative will, and must prevail, unless it contains some inherent vice that prevents it becoming a statute.

> "In many cases it would be difficult, if not impracticable, to re-enact and repeal all statutes inconsistent with a new enactment, though in the present case it would have been easy to have done so, and it would perhaps have saved some study and doubt on the part of the financial officers of the State and counties. But the ease with which it might have been done renders it less likely that these officers will be misled by the change. The act of 1870 introduces a new mode of enforcing the collection of taxes--one which dispenses with the old machinery that has proved so inefficient, and one which promises to give tax sales the validity of execution sales upon private judgments, and thus check the great and growing evil arising from the disposition of men to shirk the burden of aiding in the support of government while enjoying its protection. So far as the mode is new it is inconsistent with the old method, and clearly inconsistent with those parts of the old act which seem to have been followed by the relator."

And the court continued, l.c. 33:

> "But, while repugnant statutes necessarily supplant previous ones, they must be clearly repugnant; for unless the legislative intent is expressed in terms, it will not be assumed if any other construction can be given to the subsequent act. . . ."

It is our view that House Bill 101 comes under the ruling of the Supreme Court in State ex rel. Maguire v. Draper, supra, and not under the court's ruling in State ex rel. McNary v. Stussie, supra. Thus, to the extent that there is clear inconsistency or repugnancy between House Bill 101 and the earlier statutes to which you refer, it is our view that House Bill 101 controls.

Although we do not attempt here to determine all the questions that may arise, this means then that despite the provisions of Section 247.180, RSMo Supp. 1976, voters in order to participate in water district elections must be registered pursuant to Section 7.025 of House Bill 101 which provides that except

as provided in subsection 2 of Section 7.020 and Section 9.005, no person shall be permitted to vote in any election unless he is duly registered in accordance with that act. Similarly, election dates set for such water districts and such ambulance districts must conform to the requirements of Section 6.005 of House Bill 101.

Finally, in order to avoid confusion and litigation, we strongly recommend that the General Assembly harmonize all such conflicting prior statutes as expeditiously as possible. In this regard we are advised that the Office of the Secretary of State is preparing the necessary legislation. This office will also assist the General Assembly in any way desired toward that end.

CONCLUSION

It is the opinion of this office that Senate Substitute for House Bill 101 of the First Regular Session, 79th General Assembly, effective January 1, 1978, repeals by implication contrary provisions of Section 247.180, RSMo Supp. 1976, relating to water district elections and of Section 190.055, RSMo Supp. 1975, relating to ambulance district elections.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

December 29, 1977

OPINION LETTER NO. 229

Honorable Carole Roper Park
State Representative, District 35
11415 Gill Street
Sugar Creek, Missouri 64054

Dear Mrs. Park:

This letter is in response to your question asking whether Section 15 of Senate Substitute for House Bill 513 of the First Regular Session, 79th General Assembly, effective January 1, 1978, requires notaries employed by banks to keep a true and perfect record of notarization of titles and deeds of trust or whether such transactions are exempt from such requirement because the documents become public records.

Section 15 provides:

> "Every notary shall keep a true and perfect record of his official acts, except those connected with judicial proceedings, and those for whose public record the law provides, and if required, shall give a certified copy of any record in his office, upon the payment of the fees therefor. Every notary shall make and keep an exact minute, in a book kept by him for that purpose, of each of his official acts, except as herein provided."

This section was not changed by SSHB 513. The prior identical section, Section 486.030, RSMo 1969, was repealed; however, it

was re-enacted without change. In fact, the legislative history of that section indicates that it has been in effect for many years without change. Therefore, that section effects no change in the law.

We are unable to find any Missouri or other cases passing upon the point which you raise. However, it seems clear that such section excepts those records "connected with judicial proceedings, and those for whose public record the law provides." The law provides for the recording of deeds and deeds of trust in Section 59.330, RSMo. It is true, of course, that as a matter of practice not all such instruments are recorded; however, Section 59.330, RSMo, requires that the proper county recorders of deeds record such instruments when they are presented to them in proper form.

We understand Section 15 to mean that notaries are not required to keep a record of official acts connected with these deeds and deeds of trust "for whose public record the law provides." However, we are also of the view that the prudent course of action is for the notary to make a practice to keep a record of any official act where a doubt exists as to whether a record is required.

Inasmuch as this question has not been decided by our courts, there may be some doubt as to the meaning of the provision in question which should be resolved by the legislature. We note that it has been held that where a notary is required by law to keep a record of his official acts and in violation of his duty he fails to do so, in consequence whereof a loss is occasioned to one who is thereby deprived of evidence that the act was performed, the notary is liable for the resulting damages. 58 Am.Jur.2d Notaries Public § 44. See also Sections 33, et seq., SSHB 513.

Very truly yours,

JOHN ASHCROFT
Attorney General

ELECTIONS:
REGISTRATION:
ST. LOUIS CITY:

A person appointed a deputy registration official by an election authority under the provisions of subsection 1 of Section 7.035 of Senate Substitute for House Bill No. 101, First Regular Session, 79th General Assembly, effective January 1, 1978, is not required to be a registered voter in the jurisdiction of the appointing election authority.

OPINION NO. 231

December 29, 1977

FILED
231

Honorable John K. Travers
Chairman, Board of Election Commissioners
for the City of St. Louis
208 South Twelfth Boulevard
St. Louis, Missouri 63102

Dear Mr. Travers:

This opinion is in response to your question asking:

> "Under Section 7.035 paragraph 1, page 36 of the Missouri Comprehensive Election Act of 1977 can the election authority legally appoint a person who is a regular employee of the City Public Library who resides outside the limits of the City of St. Louis (St. Louis County) as a Deputy Registration Official?"

Senate Substitute for House Bill No. 101, First Regular Session, 79th General Assembly, is effective under the provisions of Section 1.020, of the Act on January 1, 1978.

Section 7.035 of the Act to which you refer provides:

> "1. Each election authority may appoint persons regularly employed in the office of the clerk of any city, town or village, any department of revenue fee office, or any school, library or other tax supported public agency in its jurisdiction as deputy registration officials.
>
> "2. Each election authority may appoint any number of additional persons to serve as deputy

> registration officials. Each such deputy shall be a registered voter in the jurisdiction of the appointing election authority."

The above quoted provision is identically the same to that section as it was originally introduced in House Bill No. 101.

We note that Section 7.040 of the Act provides that each election authority shall have certain duties with respect to registration among them being:

> "3. To designate the times, dates and places or areas for additional voter registration by any deputy appointed pursuant to subsection 2 of section 7.035, and to publicize the times, dates and places or areas of such registration in any manner reasonably calculated to inform the public."

Likewise Section 7.045 of the Act provides that each deputy registration official has certain duties among them being:

> "2. to [sic] conduct registration at his regular place of business throughout the entire year on all usual business days and at the usual office hours in the manner required by this chapter, unless he has been appointed pursuant to subsection 2 of section 7.035, in which case he shall conduct registration during the dates and times and at the places or areas designated by the election authority in the manner required by this chapter."

We believe the last two subsections above quoted distinguish deputies appointed pursuant to subsection 2 of Section 7.035. In view of the fact that both subsections 1 and 2 of Section 7.035 appear to be independent of each other we conclude that the qualification contained in paragraph 2, that such deputy shall be a registered voter in the jurisdiction of the appointing election authority does not apply to deputies appointed under subsection 1.

We are unaware of any other provision in the act which would require a person appointed a deputy under subsection 1 to be a registered voter in the jurisdiction of the appointing authority.

CONCLUSION

It is the opinion of this office that a person appointed a deputy registration official by an election authority under the provisions of subsection 1 of Section 7.035 of Senate Substitute for House Bill No. 101, First Regular Session, 79th General Assembly, effective January 1, 1978, is not required to be a registered voter in the jurisdiction of the appointing election authority.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

December 13, 1977

OPINION LETTER NO. 235

Honorable Michael A. Burke
State Representative, District 73
2338 Gaebler
Overland, Missouri 63114

Dear Representative Burke:

This letter is in response to your request for an opinion asking:

> "Do the provisions of House Bill No. 341, passed by the seventy-ninth general assembly and approved by the governor on July 27, 1977, preclude a peace officer from detaining a juvenile who is publicly intoxicated or prevent a finding that the juvenile is delinquent, neglected or in need of protection of the juvenile court?"

You also state:

> "House Bill No. 341 purports to decriminalize the act of public intoxication. Nevertheless, section 2 of this act states the act does not affect any laws regarding 'the sale, purchase, dispensing, possessing or use of alcoholic beverages at stated times and places or by a particular class of persons. . . .' Moreover, section 3 of this act allows a police officer to detain a person who is in an incapacitated or intoxicated condition."

House Bill 341, First Regular Session, 79th General Assembly, provides for the repeal of Section 562.260, RSMo 1969, and enacts in lieu thereof a new section bearing the same number and three new additional sections. The act provides as follows:

562.260.

"It shall be unlawful for any person in this state to enter any schoolhouse or church house in which there is an assemblage of people, met for a lawful purpose, or any courthouse, in a drunken or intoxicated and disorderly condition, or to drink or offer to drink any intoxicating liquors in the presence of such assembly of people, or in any courthouse within this state and any person or persons so doing shall be guilty of a misdemeanor.

* * *

"SECTION 1. No county or municipality, except as provided in section 2, may adopt or enforce a law, rule or ordinance which authorizes or requires arrest or punishment for public intoxication or being a common or habitual drunkard or alcoholic. No county or municipality may interpret or apply any law or ordinance to circumvent the provisions of this section.

"SECTION 2. Nothing in section 1 shall be construed to affect any law, rule or ordinance against drunken driving, driving under the influence of alcohol or other similar offense involving the operation of a vehicle, aircraft, boat, machinery, firearms or other equipment, or regarding the sale, purchase, dispensing, possessing or use of alcoholic beverages at stated times and places or by a particular class of persons, nor shall section 1 prevent the apprehension, arrest, incarceration and prosecution of any person who commits any other crime while intoxicated or under the influence of alcohol.

> "SECTION 3.(1) A person who appears to be incapacitated or intoxicated may be taken by a peace officer to the person's residence, to any available treatment service, or to any other appropriate local facility, which may if necessary include a jail, for custody not to exceed twelve hours.
>
> (2) Any officer detaining such person shall be immune from prosecution for false arrest and shall not be responsible in damages for taking action pursuant to subsection 1 above if the officer has reasonable grounds to believe the person is incapacitated or intoxicated by alcohol and he does not use unreasonable excessive force to detain such person.
>
> (3) Such immunity from prosecution includes the taking of reasonable action to protect himself or herself from harm by the intoxicated or incapacitated person."

The first above-quoted paragraph is the same as was subsection 1 of Section 562.260, prior to repeal. In addition to the new sections which are set out and which were enacted into law the effect of House Bill 341 was to repeal subsection 2 of Section 562.260, RSMo 1969, which provided:

> "(2) It shall be unlawful for any person in this state to attend or be in any other public place, in a drunken or intoxicated and disorderly condition, and any person or persons so doing shall be guilty of a misdemeanor. As used in this section, the term 'public place' concludes but is not limited to any common carrier, building, street, lane, park, or place of public resort, recreation or amusement other than a privately owned and operated business establishment."

Other sections relating to the sale of intoxicating liquor or beer or nonintoxicating beer to minors and possession of intoxicating liquor or beer or nonintoxicating beer by minors were not repealed and are still in effect. See Sections 311.310, 311.320, 311.325, 312.405 and 312.407, RSMo 1969.

Assuming, however, that we are not dealing directly with the statutory prohibitions which still exist and that your question is limited to the simple situation where the minor is found in an intoxicated or seemingly intoxicated condition which indicates that he is in need of care, we believe that Section 211.031, RSMo Supp. 1976, is applicable.

Subsection 1(1)(c) of such section provides:

> "1. Except as otherwise provided herein, the juvenile court shall have exclusive original jurisdiction in proceedings:
>
> (1) Involving any child who may be a resident of or found within the county and who is alleged to be in need of care and treatment because:
>
> * * *
>
> (c) The behavior, environment or associations of the child are injurious to his welfare or to the welfare of others;"

Reading the last quoted section in conjunction with Section 3 of House Bill 341 indicates, in our view, that if such a "child" (defined as a person under seventeen years of age, Section 211.021, RSMo 1969) is found in an intoxicated or incapacitated condition, he may be taken by a peace officer ". . . to the person's residence, to any available treatment service, or to any other appropriate local facility, . . ." Such "appropriate local facility" would usually be a facility under the jurisdiction of the juvenile court.

Therefore, it is our view that the provisions of House Bill 341 do not preclude a peace officer from detaining a juvenile who is publicly intoxicated or prevent the judge of the juvenile court from making a determination that such a juvenile is within the exclusive jurisdiction of the court pursuant to subsection 1(1)(c) of Section 211.031.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

December 29, 1977

OPINION LETTER NO. 236

Dr. Richard J. Judd
Acting Director
Missouri Department of Revenue
Jefferson Building
Jefferson City, Missouri 65101

Dear Dr. Judd:

This letter is in response to a request for an opinion on the following question:

> "Is the Director of Revenue obligated under section 94.530, RSMo to begin collecting a one percent city sales tax for the Village of Country Life Acres, Missouri, when the ordinance calling for a special election to be held on September 28, 1977 on the sales tax proposition was adopted and approved by the governing body of the city prior to the effective date of the amendment to section 94.500 of the City Sales Tax Act, . . ."

It is our understanding that Country Life Acres, Missouri, a village of less than 500 population, authorized a special election dealing with city sales tax by Ordinance No. 148, passed and adopted on August 22, 1977. At a special election held on September 28, 1977, the voters of the village of Country Life Acres voted in favor of a proposition imposing a sales tax of one percent on the receipts from the sale at retail of all tangible personal property and taxable services at retail within the Village of Country Life Acres. Ordinance No. 6.09, imposing the sales tax, was adopted on the same day by the Board of Trustees in response to the favorable vote.

Dr. Richard J. Judd

In House Bill No. 165, the 79th General Assembly passed an act repealing § 94.500, RSMo 1969, and replacing it with a new section which changed the definition of the term "city." The effective date of this act was September 28, 1977. Prior to that time, the City Sales Tax Act, §§ 94.500 to 94.570, was available only to those cities having a population of 500 or more. See §§ 94.500(1), RSMo 1969, and 144.460, RSMo 1975 Supp.

In Opinion No. 359, issued December 10, 1969, to the Honorable William C. Phelps, this office concluded that a city could not, before the effective date of the City Sales Tax Act, pass an ordinance levying a sales tax in accordance with the provisions of the Act, and call a special election thereon to be held subsequent to the effective date of the Act. However, that opinion has been withdrawn.

Section 94.510, RSMo 1969, the section setting forth the procedures by which a city may impose a city sales tax, is identical in form with the provisions of House Committee Substitute for Senate Substitute for Senate Bill No. 234, 79th General Assembly, which set up procedures for the imposition of a countywide sales tax effective September 28, 1977. In Opinion No. 237, issued December 20, 1977 (copy enclosed), this office interpreted the activities of the governing body prior to the election of the people as being preliminary in nature such that action by the governing body prior to the effective date of the legislative act would not invalidate any tax adopted by a vote of the people subsequent to the date of the act.

In our opinion, the same interpretation is applicable to this matter. Under the provisions of § 94.510, RSMo 1969, of the City Sales Tax Act, adoption of the tax cannot be accomplished until the vote of the people authorizes and effectuates the imposition of the tax. In reviewing the activities of the governing board of Country Life Acres, it is apparent that Ordinance No. 148 was passed in anticipation of the effective date of H.B. No. 165. However, the activities of the governing body did not affect the substantive rights of taxpayers within the city. As of the date of the special election, September 28, 1977, the Village of Country Life Acres was allowed by law to impose a city sales tax.

Dr. Richard J. Judd

After the tax had been adopted by a majority vote of the persons voting in the special election, the results were certified to the director of revenue in accordance with subsection 3 of Section 94.510. Under these circumstances, it is our opinion that you have been presented with sufficient notice of the adoption of a valid taxing ordinance in the Village of Country Life Acres to cause you to perform your duties under the provisions of § 94.530, RSMo 1969.

Yours very truly,

JOHN ASHCROFT
Attorney General

Enc: Op. No. 237
12/20/77

DEPARTMENT OF REVENUE:
COUNTY SALES TAX:

The October 14, 1977 notice to the director of revenue of the adoption of a countywide sales tax by St. Louis County under S.B. No. 234 is sufficient to cause the director to perform his duties under the provisions of S.B. No. 234.

OPINION NO. 237

December 19, 1977

FILED
237

Dr. Richard J. Judd
Acting Director
Missouri Department of Revenue
Jefferson Office Building
Jefferson City, Missouri 65101

Dear Dr. Judd:

This is in response to your request for an opinion on the following questions:

> "A. Is the Director of Revenue obligated under Section 3 of the County Sales Tax Act to begin collecting a one percent St. Louis County Sales Tax when the ordinance imposing the one percent countywide sales tax and calling for a special election to be held on October 4, 1977 was adopted and approved by the governing body of St. Louis County prior to the effective date of the County Sales Tax Act, September 28, 1977?
>
> "B. Is the Director of Revenue obligated under Section 3 of the County Sales Tax Act to begin collecting a one percent St. Louis County Sales Tax when the ordinance imposing the sales tax provides that the tax shall be effective only upon the approval of a majority of the qualified electors of the county in an election called for that purpose, and the only certification to the Director of Revenue is that a majority of votes cast on the proposal by the qualified voters voting thereon are in favor of the proposal?"

By House Committee Substitute for Senate Substitute for Senate Bill No. 234, (hereinafter referred to as S.B. No. 234) which became effective September 28, 1977, the 79th General Assembly passed an act allowing certain counties to impose a countywide sales tax for the benefit of both the incorporated and the unincorporated areas of the county. The Act provides, in pertinent part, that:

> "SECTION 1. 1. The governing body of any county of the first class having a charter form of government and not containing a city with a population of four hundred thousand or more may by adopting an ordinance, impose a countywide sales tax for the benefit of both the incorporated and the unincorporated areas of the county; provided, however, that no ordinance enacted pursuant to the authority granted by the provisions of this act shall be at variance with the provisions as set forth in this act, and no ordinance shall be effective unless the governing body of the county submits to the voters of the county, at a countywide general or primary election or at a special election called for that purpose, a proposal to authorize the governing body of the county to impose a tax under the provisions of this act. . . . If a majority of the votes cast on the proposal by the qualified voters voting thereon are in favor of the proposal, then the ordinance shall be in effect. . . .
>
> * * *
>
> "3. Within ten days after the adoption of the ordinance, the county clerk shall forward to the director of revenue by United States registered mail or certified mail a certified copy of the ordinance of the governing body. The ordinance shall reflect the effective date thereof and shall be accompanied by a map of the county clearly showing the boundaries thereof.
>
> * * *

> "4. The tax shall become effective on the first day of the second calendar quarter after the director of revenue receives notice of adoption of the tax, or on February 1, 1978, if notice is received by the director of revenue prior to December 31, 1977.
>
> * * *
>
> "SECTION 3. After the effective date of any tax imposed under the provisions of this act, the director of revenue shall perform all functions incident to the administration, collection, enforcement, and operation of the tax, and the director of revenue shall collect in addition to the sales tax for the state of Missouri the additional tax authorized under the authority of this act. . . ."

Ordinance No. 8378, approved by the governing body of the county on September 8, 1977, and signed by the County Supervisor on September 13, 1977, provides as follows:

> "SECTION 1. That a one percent Countywide sales tax is hereby imposed in accordance with the provisions of the House Committee Substitute for the Senate Substitute for Senate Bill Number 234 as passed by the First Regular Session of the 79th General Assembly.
>
> SECTION 2. That Section 1 of this ordinance shall be effective only upon the approval of a majority of the qualified electors of St. Louis County in an election called for said purpose.
>
> SECTION 3. That a special election shall be and the same is hereby called and ordered to be held in St. Louis County, Missouri, on the 4th day of October, 1977, for the purpose of submitting to the qualified electors of said County, the issue of whether a one percent Countywide sales tax shall be imposed."

The special election called for in the Ordinance was held on October 4, 1977. At this election, a majority of the voters

casting ballots were in favor of the countywide sales tax. On October 14, 1977, the Administrative Director of St. Louis County forwarded to the director of revenue a copy of Ordinance No. 8378 in addition to a map of St. Louis County and a certified copy of the election results as evidence of the adoption of the ordinance.

The act of adoption required by S.B. 234 is a process composed of two steps which must be completed before a countywide sales tax can be validly imposed. The first step is approval by the governing body of the county of an ordinance describing the tax which, when adopted by the people, imposes the tax. The second step is an election in which the people vote to authorize and effectuate the imposition of the tax.

Careful analysis of S.B. 234 reveals that the legislature views the adoption of an ordinance imposing the tax by the governing body as a preliminary act, incomplete and ineffective until authorized and adopted by the voters. Subsection 3 of Section 1 of S.B. 234 states:

> "Within ten days after the adoption of the ordinance, the county clerk shall forward to the director of revenue . . . a certified copy . . . of the ordinance . . . [which] . . . shall reflect the effective date thereof. . . ."

Since there can be no "effective date" without voter approval it is clear that the word "adoption" refers to the completion of the process by the voters. To read subsection 3 as requiring notice to the director after ordinance approval by the governing body of the county would be absurd. Since no other notice to the director is authorized, such notice before the election would force the director to institute procedures for the collection of the tax, even in cases where the voters might subsequently reject the proposal. It is clear that S.B. 234 refers to adoption as the completed adoption process including voter approval.

Since Section 1 mandates voter adoption to effectuate the ordinance and subsection 3 of Section 1 clearly suggests that the ordinance has not been adopted until the vote of the people has been cast, S.B. 234 is consistent only when the step taken by the governing body of the county is viewed as preliminary, gaining substance and effect only when authorized and approved by the voters.

A similar situation arose in the case of Vrooman v. City of St. Louis, 337 Mo. 933, 88 S.W.2d 189 (En Banc 1935). In Vrooman, a taxpayer of the City of St. Louis challenged the issuance of bonds by the city pursuant to an act of the General Assembly authorizing the issuance of such bonds. The act provided that bonds could only be issued if issuance had been approved by a two-thirds majority of the voters of the city at a special or general election. The act further provided that such election was to be called by the Board of Aldermen of the city after being petitioned to do so by a thousand taxpayers of the city. An emergency clause in the act provided for its immediate effectiveness upon signature by the Governor. See C.S.H.B. 445, Laws of Missouri 1935, page 193.

In accordance with the emergency clause of the act, the Board of Aldermen of St. Louis called for an election to determine if the voters wanted a bond issue. The taxpayer claimed that the activities of the Board of Aldermen in accepting the one thousand petitions and in calling the special election were of no effect because the emergency clause in the act was invalid. Therefore, the taxpayer contended that no actions could be taken under the terms of the statute until it would have become effective in the normal course of events. In disposing of this contention, the Missouri Supreme Court ruled:

> "Appellant insists that even if the Enabling Act is valid, the emergency clause was not, and consequently all proceedings prior to August 27, 1935 (the date the Enabling Act would be effective without a valid emergency clause), were invalid. We do not think it necessary to determine the validity of the emergency clause. The bond election was not held until September 10, 1935, after the Enabling Act was effective without any emergency clause. Therefore, no substantive right of any one was invaded by the performance of the pre-election preliminaries prior to August 27." Vrooman v. City of St. Louis, supra, 88 S.W.2d at 196-197.

It is clear from this language, that the Missouri Supreme Court refused to invalidate actions undertaken by a local government in anticipation of forthcoming rights when such activities were preliminary in nature and did not violate the substantive rights of the persons affected.

In reviewing Ordinance No. 8378, it is apparent that the governing body of St. Louis County acted in anticipation of the effective date of S.B. No. 234. However, the activities of the governing body did not affect the substantive rights of taxpayers within the county. As of the date of the special election, October 4, 1977, S.B. No. 234 was in effect.

After the tax had been adopted by a majority vote of the persons voting in the special election, the results were certified to the director of revenue in accordance with subsection 3 of Section 1 of S.B. No. 234. Under these circumstances, it is our opinion that you have been presented with sufficient notice of the adoption of a valid taxing ordinance in St. Louis County to cause you to perform your duties under the provisions of Section 3 of S.B. No. 234.

With respect to Part B of your request for an opinion, we note that the ordinance in question does indicate that the tax is to be effective only upon the approval of a majority of the qualified electors of the county. However, it is also clear from reading that ordinance that it was imposed by the governing body of St. Louis County in accordance with and in response to the provisions of S.B. No. 234. We note that subsection 1 of Section 1 of S.B. No. 234 only requires a favorable vote by a majority of the qualified voters voting on the question of whether or not a countywide sales tax should be approved. From the results certified to you by the county, it is clear that the statutory prerequisites have been met. That is, a majority of the voters voting upon the question indicated approval for the tax. That being so, any language in the ordinance to the contrary is surplusage and should be ignored.

CONCLUSION

It is the opinion of this office that the October 14, 1977 notice to you of the adoption of a countywide sales tax by St. Louis County under S.B. 234 is sufficient to cause you to perform your duties under the provisions of S.B. 234.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

JEFFERSON CITY
65101

(314) 751-3321

December 29, 1977

OPINION LETTER NO. 238

Dr. Richard J. Judd
Acting Director
Missouri Department of Revenue
Jefferson Office Building
Jefferson City, Missouri 65101

Dear Dr. Judd:

This letter is in response to your request for an opinion on the following questions:

> "A. May an incorporated city, town or village in the State of Missouri not having a population of five hundred or more enact a city sales tax under section 94.500 to 94.570, as amended, on September 28, 1977?
>
> B. Is the Director of Revenue obligated under section 94.530, RSMo to begin collecting a one percent city sales tax for the Village of Champ, Missouri, when the ordinance imposing the tax and calling for a special election to be held on September 28, 1977 was adopted and approved by the governing body of the city prior to the effective date of the amendment to section 94.500 of the City Sales Tax Act, September 28, 1977?"

House Bill No. 165 of the 79th General Assembly, which became effective on September 28, 1977, amended § 94.500, RSMo 1969, by removing the population limitation in the definition of the term "city." Prior to this time, § 94.500(1) had defined that term as meaning an incorporated city, town or village with a population of 500 or more. In addition,

Dr. Richard J. Judd

§ 144.460, RSMo 1975 Supp., prohibited the imposition of a sales tax by any city, town or village with less than 500 inhabitants. However, it is apparent that the Legislature repealed this limitation by enacting H.B. No. 165. Under the provisions of H.B. No. 165, any incorporated city, town or village in the State of Missouri may impose a city sales tax upon its inhabitants in accordance with the provisions set forth in the City Sales Tax Act, §§ 94.500 to 94.570, RSMo 1969.

It is our understanding that the governing body of Champ, Missouri, a village of less than 500 people, passed an ordinance prior to the effective date of H.B. No. 165, imposing the city sales tax and calling for a special election to be held on September 28, 1977. In construing the provisions of the City Sales Tax Act, this office issued Opinion No. 359, on September 10, 1969, to the Honorable William C. Phelps stating that a city could not pass an ordinance levying a sales tax in accordance with the provisions of the City Sales Tax Act prior to the effective date of the Act. However, that opinion has been withdrawn.

The method by which a city sales tax can be imposed, as contained in § 94.510, RSMo 1969, is identical to that contained in House Committee Substitute for Senate Substitute for Senate Bill No. 234, 79th General Assembly, effective September 28, 1977, which authorized the imposition of a countywide sales tax. In Opinion No. 237, issued December 20, 1977, (copy attached) this office construed the activities of the governing board under the terms of S.B. No. 234 as being preliminary in nature, incomplete and ineffective until authorized and adopted by the voters. This being so, it was our opinion that actions taken by a local governing body prior to the effective date of the substantive law would not invalidate subsequent action taken pursuant to such laws.

We believe that the position set forth in Opinion No. 237 is dispositive of the issue here. In reviewing the actions of the governing body of Champ, Missouri, it is apparent that the governing body acted in anticipation of the effective date of H.B. No. 165. However, the activities of the governing body did not affect the substantive rights of taxpayers within the Village of Champ. As of the date of the special election, September 28, 1977, H.B. No. 165 was in effect and villages under 500 in population could legally impose a city sales tax.

After the tax had been adopted by a majority vote of the persons voting in the special election, the results were certified

Dr. Richard J. Judd

to the director of revenue in accordance with subsection 3 of § 94.510, RSMo 1969. Under these circumstances, it is our opinion that you have been presented with sufficient notice of the adoption of a valid taxing ordinance in the Village of Champ, Missouri, to cause you to perform your duties under the provisions § 94.530, RSMo. 1969.

Very truly yours,

JOHN ASHCROFT
Attorney General

Enc: Op. No. 237
12/20/77

ELECTIONS: After January 1, 1978, the effective date of Senate Substitute for House Bill 101, First Regular Session, 79th General Assembly, (the Comprehensive Election Act of 1977), attorneys employed by the boards of election commissioners are considered employees within the provisions of Section 2.075 of that Act which requires that employees of each board be selected in equal numbers from the two major political parties. Selection in equal numbers, however, does not require equal selection according to position classification.

OPINION NO. 249

December 22, 1977

Honorable Frank Bild
State Senator, 15th District
7 Meppen Court
St. Louis, Missouri 63128

Dear Senator Bild:

This opinion is in response to your question asking:

> "Senate Substitute for House Bill 101 passed by the 79th General Assembly, Section 2.070, provides that 'Each board of election commissioners shall have the right to employ such attorneys and other employees as may be necessary to promptly and correctly perform the duties of the board. Where an electronic voting system or voting machines are used, the board shall designate competent employees to have custody of and supervise maintenance of the voting equipment. Board employees shall be subject to the same restrictions and subscribe the same oath as members of the board, except that no employee of a board shall be required to post bond unless directed to do so by the board. Employee oaths and any bonds shall be filed and preserved in the office of the board.'
>
> "Section 2.075 provides 'Employees of each board shall be selected in equal numbers from the two major political parties. Each board may adopt regulations to govern the hiring, probationary period, tenure, discipline, discharge and retirement of its employees.'

> "In reading these two Sections together, the question is whether or not the Board of Election Commissioners is obligated to employ a Democrat attorney and a Republican attorney as provided in the second paragraph (Section 2.075)."

You further state:

> "Presently, the Board of Election Commissioners in the various parts of the state have traditionally employed one attorney from the party represented by the Governor of the state. The question has arisen as to whether or not the new law provided by S.S.H.B. 101 now mandates that there should be an attorney representing each of the two major political parties. There seems to be no doubt as to all other employees, that they should be divided equally. The question has arisen whether this requirement also applies as far as the attorney is concerned."

In our view there is no ambiguity in the provisions quoted. The construction of a statute must be determined by what the legislature has said and not by what it is thought the legislature intended to say. Gray v. Wallace, 319 S.W.2d 582 (Mo. 1958). Therefore, attorneys are considered "employees" under such sections.

There is a question, however, as to whether the selection in "equal numbers" means merely the employment of equal numbers of employees without regard to position classification or the employment of equal numbers of like classification. We believe that the clear provisions of the Act require the employment of only "equal numbers" of employees and not of equal numbers of employees in identical or similar positions. Therefore, while the employment of an attorney would be considered in determining the number of employees from each party, it is not necessary to employ two attorneys if one attorney is employed. Selection of employees must, of course, be consistent with the limitations respecting hiring of employees under Section 2.080 of the Act.

CONCLUSION

It is the opinion of this office that after January 1, 1978, the effective date of Senate Substitute for House Bill 101, First Regular Session, 79th General Assembly, (the Comprehensive Election Act of 1977), attorneys employed by the boards of election commissioners are considered employees within the provisions of Section

2.075 of that Act which requires that employees of each board be selected in equal numbers from the two major political parties. Selection in equal numbers, however, does not require equal selection according to position classification.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,

JOHN ASHCROFT
Attorney General